16B C.J.S. Constitutional Law IV XI Refs.

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XI. Freedom of Speech and of the Press

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, First Amendment
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A.L.R. Index, Freedom of Speech and Press
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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, First Amendment
A.L.R. Index, Fourteenth Amendment
A.L.R. Index, Freedom of Speech and Press
A.L.R. Index, Police Power
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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 918. Nature of free speech right

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490 to 1495, 1497, 1498, 1500, 1502, 1503

Freedom of speech and freedom of press are fundamental personal rights and liberties.

Constitutional guaranties of free speech and press prevent government from restraining or prohibiting protected speech or expressive conduct[1] and protect the citizenry from governmental suppression of ideas[2] by allowing issues to be freely and vigorously discussed.[3] Freedom of speech and freedom of press are fundamental personal rights and liberties[4] and are keystone rights allowing the preservation of all other rights.[5]

The freedoms of speech and press are guaranteed against invasion by the federal government by the First Amendment to the Constitution of the United States, which provides that "Congress shall make no law … abridging the freedom of speech, or of the press."[6] Although the First Amendment to the Federal Constitution, like other of the first 10 amendments,[7] is a limitation on the power of Congress only,[8] the Fourteenth Amendment safeguards liberty of speech and of the press from state aggression.[9] Consequently, the constitutional guaranty of free speech is a national right, federally guaranteed, which no state, nor all together, nor the nation itself, can prohibit, restrain, or impede.[10]

The constitutional guaranties of freedom of speech and of press occupy a preferred position under federal and state constitutions.[11] They are, like other personal rights, to be construed liberally[12] and given broad scope.[13] Speech is presumed to be protected.[14] Where there is a willing speaker, the protection afforded is to the communication, to its source and to its recipients.[15] Exercise of the rights of speech and press is entitled to the same protection regardless of frequency of utterance[16] and whether it takes place in public or in private.[17] The motive of the speaker is irrelevant.[18]

It is a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.[19]

CUMULATIVE SUPPLEMENT

Cases:

The First Amendment is a kind of Equal Protection Clause for ideas. (Per Justice Kavanaugh, with two Justices concurring and four Justices concurring in the judgment.) U.S. Const. Amends. 1, 5, 14. Barr v. American Association of Political Consultants, Inc, 140 S. Ct. 2335 (2020).

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. U.S.C.A. Const.Amends. 1, 14. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

The First Amendment does not permit the State to sacrifice speech for efficiency. U.S.C.A. Const.Amend. 1. National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, because speech concerning public affairs is more than self-expression; it is the essence of self-government. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Retail business owners had standing under Article III to bring action against California Attorney General, alleging that their First Amendment rights to free speech were violated by statute prohibiting retailers from imposing surcharge on customers who used a credit card in lieu of payment by cash, check, or similar means, even though no legal proceedings had been brought against owners and there had been no history of past prosecution or enforcement of the statute generally; California conceded that if large retailers across the state began engaging in dual-pricing behavior and used the word "surcharge" to describe the price difference, an enforcement action would likely occur. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const.Amend. 1; West's Ann.Cal.Civ.Code § 1748.1. Italian Colors Restaurant v. Harris, 99 F. Supp. 3d 1199 (E.D. Cal. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Idaho—Edmondson v. Shearer Lumber Products, 139 Idaho 172, 75 P.3d 733, 7 A.L.R.6th 841 (2003).
Wash.—State v. Riles, 135 Wash. 2d 326, 957 P.2d 655 (1998) (abrogated on other grounds by, State v. Valencia, 169 Wash. 2d 782, 239 P.3d 1059 (2010)).
No abridgement
The First Amendment protects the right to be free from government abridgement of speech.

U.S.—Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009); Sweeney v. Pence, 767 F.3d 654 (7th Cir. 2014).

2 Pa.—Com. v. Bricker, 542 Pa. 234, 666 A.2d 257 (1995).

3 Okla.—Gaylord Entertainment Co. v. Thompson, 1998 OK 30, 958 P.2d 128 (Okla. 1998).

Removal of governmental restraints from arena of public discussion

The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of the public.

U.S.—England v. Hatch, 43 F. Supp. 3d 1233, 314 Ed. Law Rep. 344 (D. Utah 2014)

Negative liberty

The First Amendment does not impose upon public officials an affirmative duty to ensure a balanced presentation of competing viewpoints; to the contrary, freedom of speech is a negative liberty, in that the First Amendment restricts the government's power to abridge speech, but it is not a source of government power, much less a mandate, to orchestrate public discussion.

U.S.—Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013).

4 U.S.—Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

Colo.—Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044 (Colo. 2002), as modified on denial of reh'g, (Apr. 29, 2002).

Ga.—McKenzie v. State, 279 Ga. 265, 626 S.E.2d 77 (2005).

Fundamental right not confined to newspapers and periodicals

N.H.—Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (2010).

5 Wash.—Nelson v. McClatchy Newspapers, Inc., 131 Wash. 2d 523, 936 P.2d 1123 (1997).

Indispensable condition of other freedoms

U.S.—Dowd v. City of Los Angeles, 28 F. Supp. 3d 1019 (C.D. Cal. 2014).

6 U.S. Const. Amend. I.

7 Discussed, generally, in § 145.

8 U.S.—Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975).

Ill.—City of Chicago v. Groffman, 68 Ill. 2d 112, 11 Ill. Dec. 283, 368 N.E.2d 891 (1977).

9 § 930.

10 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

11 U.S.—Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944).

Colo.—People v. Smith, 862 P.2d 939 (Colo. 1993).

Equal, if not paramount, to property rights

N.C.—Corum v. University of North Carolina Through Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276, 72 Ed. Law Rep. 652 (1992).

12 U.S.—N. L. R. B. v. Howard Quarries, Inc., 362 F.2d 236 (8th Cir. 1966).

13 U.S.—Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

14 U.S.—Bursey v. U. S., 466 F.2d 1059 (9th Cir. 1972); High Ol' Times, Inc. v. Busbee, 456 F. Supp. 1035 (N.D. Ga. 1978), judgment aff'd, 621 F.2d 141 (5th Cir. 1980).

15 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

Cal.—Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981).

Dual injury

An ordinance that silences a willing speaker also works constitutional injury against the hearer.

U.S.—Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982).

16 Cal.—Carl v. City of Los Angeles, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (2d Dist. 1976).

17 Pa.—Boyer v. Com., Unemployment Compensation Bd. of Review, 51 Pa. Commw. 191, 415 A.2d 425 (1980), order rev'd on other grounds, 499 Pa. 552, 454 A.2d 524 (1982).

S.C.—Stevenson v. Lower Marion County School Dist. No. Three, 285 S.C. 62, 327 S.E.2d 656, 23 Ed. Law Rep. 1101 (1985).

18 U.S.—Henrico Professional Firefighters Ass'n Local 1568 v. Board of Sup'rs of Henrico County, 649 F.2d 237 (4th Cir. 1981).

Biased speech

Biased and improperly motivated speech is protected by the First Amendment.

S.D.—Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).

19 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); Priests For Life v. U.S. Dept. of Health and Human Services, 772 F.3d 229 (D.C. Cir. 2014); Michigan Catholic Conference v. Sebelius, 989 F. Supp. 2d 577 (W.D. Mich. 2013), aff'd, 755 F.3d 372 (6th Cir. 2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 919. Applicability of free speech right

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1493 to 1495, 1497, 1499 to 1507, 1545, 1555, 1564, 1580

The right of free speech and press is not limited to any particular class of persons.

The right of free speech and of free press is a general one which is not limited to any particular class of persons.[1] The constitutional guaranty applies to all persons without regard to citizenship[2] and extends to aliens[3] and minors.[4] Generally, the right extends to corporations,[5] even when, because of the nature of their activities, they are extensively regulated by government,[6] as well as to unions[7] and associations.[8]

The First Amendment does not protect the government even when the government purports to act through legislation reflecting collective speech.[9]

CUMULATIVE SUPPLEMENT

Cases:

The Free Speech Clause does not prohibit private abridgment of speech. U.S. Const. Amend. 1. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 (2019).

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that legislative body thinks unsuitable for them. U.S.C.A. Const.Amend. 1. Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

The First Amendment has no application when what is restricted is not protected speech. U.S.C.A. Const.Amend. 1. Nevada Com'n on Ethics v. Carrigan, 564 U.S. 117, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011).

Social media posts made by defendant about victim but not sent directly to her or anyone else, were speech protected by the First Amendment and did not fall within the speech integral to criminal conduct exception to First Amendment protection in prosecution of defendant for stalking. U.S. Const. Amend. 1; N.C. Const. art. 1, § 14.; N.C. Gen. Stat. Ann. § 14-277.3A. State v. Shackelford, 825 S.E.2d 689 (N.C. Ct. App. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 486 (C.C.A. 8th Cir. 1946); Brayshaw v. City of Tallahassee, Fla., 709 F. Supp. 2d 1244 (N.D. Fla. 2010).

2 U.S.—Hague v. Committee for Indus. Organization, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

3 U.S.—Bridges v. Wixon, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945).

4 Cal.—In re Scott K., 24 Cal. 3d 395, 155 Cal. Rptr. 671, 595 P.2d 105 (1979).
Rights not coextensive with those of adults
U.S.—Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Johnson v. City of Opelousas, 658 F.2d 1065, 32 Fed. R. Serv. 2d 879 (5th Cir. 1981).

5 U.S.—Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012).
Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).
Me.—Central Maine Power Co. v. Public Utilities Com'n, 1999 ME 119, 734 A.2d 1120 (Me. 1999).

6 **Utilities**
U.S.—Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).
N.Y.—Rochester Gas and Elec. Corp. v. Public Service Commission of the State of N.Y., 51 N.Y.2d 823, 433 N.Y.S.2d 420, 413 N.E.2d 359 (1980).

7 Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).

8 Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).
Officers and members
U.S.—Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978).
Political parties and independent candidates
U.S.—Greenberg v. Bolger, 497 F. Supp. 756 (E.D. N.Y. 1980).

9 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 920. Persons bound by free speech guaranty

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1491, 1493 to 1495, 1497, 1499 to 1507, 1526 to 1528

The right of free speech and press may not be infringed by statutes, ordinances, or judicial decrees.

Under the Federal Constitution, freedom of speech and the press is protected against invasion by state action.[1] The Free Speech Clause of the First Amendment is applicable to the political subdivisions of the states.[2] The legislature has no power to infringe on the constitutional guaranty of freedom of speech and of the press[3] so that statutes and ordinances in violation of the constitutional guaranties are null and void.[4]

While the First Amendment and some state constitutional provisions restrict only government and not private persons or corporations,[5] under other state constitutions, the guaranties protect against individual and group interference as well as legislative curtailment.[6]

The courts also are bound by the constitutional guaranty.[7] Accordingly, any judicial decree[8] or action taken in a criminal proceeding[9] which violates the principle of freedom of speech and press is within the restriction of the constitutional guaranty.

Court enforcement of certain private agreements constitutes state action, for purposes of the First Amendment Free Speech Clause.[10]

The First Amendment also bars the executive branch from taking any action that abridges the freedom of speech or of the press.[11]

Not only does the First Amendment protect freedom of speech, it also protects the right to be free from retaliation by a public official for the exercise of that right.[12]

CUMULATIVE SUPPLEMENT

Cases:

The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. U.S. Const. Amend. 1. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 (2019).

Private operator of online platform for user-generated video content did not conduct a quintessential public function through regulation of speech on a public forum by inviting public discourse on its private property, and thus First Amendment's state action doctrine precluded constitutional scrutiny of operator's content moderation pursuant to terms of service and community guidelines; relevant function performed by operator was not an activity that only governmental entities have traditionally performed, operator did not perform all necessary municipal functions, did not operate a digital business district that had all the characteristics of any other American town, and operator was not owned, leased, or otherwise controlled by the government. U.S. Const. Amend. 1. Prager University v. Google LLC, 951 F.3d 991 (9th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 N.D.—Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).
No infringement without state action
Cal.—Yu v. University of La Verne, 196 Cal. App. 4th 779, 126 Cal. Rptr. 3d 763, 268 Ed. Law Rep. 454 (2d Dist. 2011).
N.J.—Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 46 A.3d 507 (2012).
Public function test for state action
U.S.—Dushane v. Leeds Hose Co. #£1 Inc., 6 F. Supp. 3d 204 (N.D. N.Y. 2014).

2 U.S.—Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011).
Applies to municipal governments
U.S.—Act Now To Stop War and End Racism Coalition v. District of Columbia, 798 F. Supp. 2d 134 (D.D.C. 2011).

3 U.S.—Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969); Zamora v. Columbia Broadcasting System, 480 F. Supp. 199 (S.D. Fla. 1979).

4 U.S.—Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).
Ky.—Ladd v. Com., 313 Ky. 754, 233 S.W.2d 517 (1950).

5 U.S.—Hudgens v. N. L. R. B., 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); Rodriguez v. Winski, 973 F. Supp. 2d 411 (S.D. N.Y. 2013).
Cal.—Golden Gateway Center v. Golden Gateway Tenants Assn., 26 Cal. 4th 1013, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001).
Idaho—Edmondson v. Shearer Lumber Products, 139 Idaho 172, 75 P.3d 733, 7 A.L.R.6th 841 (2003).
Mass.—Roman v. Trustees of Tufts College, 461 Mass. 707, 964 N.E.2d 331, 278 Ed. Law Rep. 1095 (2012).

Nev.—Seres v. Lerner, 120 Nev. 928, 102 P.3d 91 (2004).

6 N.J.—Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 103 A.3d 249 (2014).

State responsibility for private action

A person asserting a constitutional violation arising from a restriction on speech that occurred on private property must show that the State was significantly involved; the factors to be considered in determining whether state action has been shown include the source of authority for the private action, whether the State is so entwined with the regulation of the private conduct as to constitute state activity, whether there is meaningful state participation in the activity, and whether there has been a delegation of what has traditionally been a state function to a private person.

N.Y.—Downs v. Town of Guilderland, 70 A.D.3d 1228, 897 N.Y.S.2d 264 (3d Dep't 2010).

7 Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).

N.M.—Twohig v. Blackmer, 1996-NMSC-023, 121 N.M. 746, 918 P.2d 332 (1996).

8 U.S.—New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), judgment aff'd, 457 U.S. 702, 102 S. Ct. 2672, 73 L. Ed. 2d 327 (1982).

9 **Failure to instruct**

The trial court's failure to instruct the jury that the defendant could be convicted of disorderly conduct only if she had uttered "fighting words," that is, language having a substantial tendency to provoke violent retaliation, deprived the defendant of the fundamental right to free speech.

Conn.—State v. Anonymous (1978-4), 34 Conn. Supp. 689, 389 A.2d 1270 (Super. Ct. Appellate Sess. 1978) (overruled on other grounds by, State v. Moulton, 310 Conn. 337, 78 A.3d 55 (2013)).

10 U.S.—Democratic Nat. Committee v. Republican Nat. Committee, 673 F.3d 192, 81 Fed. R. Serv. 3d 1125 (3d Cir. 2012), cert. denied, 133 S. Ct. 931, 184 L. Ed. 2d 751 (2013).

11 Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).

12 U.S.—Royal Crown Day Care LLC v. Department of Health and Mental Hygiene of City of New York, 746 F.3d 538 (2d Cir. 2014); Smith v. Gilchrist, 749 F.3d 302 (4th Cir. 2014); Murphy-Taylor v. Hofmann, 968 F. Supp. 2d 693 (D. Md. 2013).

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16B C.J.S. Constitutional Law § 921

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 921. Form of free speech expression

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1492, 1497, 1500, 1503, 1550, 1555, 1559, 1564, 1580, 2070

The right of free speech and press embraces every form of dissemination of ideas.

The primary concern of the free-speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message.[1] The right embraces every form and manner of dissemination of ideas that appears best fitted to bring the ideas and views to the attention of the general populace and to the attention of those most concerned with them.[2] The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed,[3] and the use of a less conventional avenue of communications does not result in reduced First Amendment protection.[4] However, the First Amendment right to free speech does not guarantee an individual the most effective means of communication, only the means to communicate effectively.[5]

Choice of language is a form of expression as real as the textual message conveyed.[6] A state cannot prohibit all persons within its borders from speaking in the language of their choice.[7]

Freedom of the press is not limited to publications intended to educate the public,[8] to political expression or comment on public affairs,[9] or to the exposition of ideas but extends to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.[10]

The rights to freedom of speech and press and to freedom of assembly and petition, although not identical, are inseparable and are cognate rights.[11] Included within the guaranty of right of free speech is the right to exercise it in union with others through membership in organizations seeking political or economic change.[12]

The First Amendment protects the right to refrain from speaking[13] and to decide what not to say,[14] as mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.[15] Thus, just as the First Amendment may prevent the government from prohibiting speech, it may prevent the government from compelling expression of certain views.[16]

CUMULATIVE SUPPLEMENT

Cases:

Whatever the challenges of applying the Constitution to ever-advancing technology, basic principles of freedom of speech and press, like the First Amendment's command, do not vary when new and different medium for communication appears. U.S.C.A. Const.Amend. 1. Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

[END OF SUPPLEMENT]

Footnotes

1 Okla.—Gaylord Entertainment Co. v. Thompson, 1998 OK 30, 958 P.2d 128 (Okla. 1998).

2 U.S.—Smith v. Arkansas State Highway Emp., Local 1315, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).
Kan.—State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760 (1976).
Creation and dissemination of information
U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

3 Cal.—In re Kay, 1 Cal. 3d 930, 83 Cal. Rptr. 686, 464 P.2d 142 (1970).
Ind.—Whittington v. State, 669 N.E.2d 1363 (Ind. 1996).
Right to select means
U.S.—Citizens for Tax Reform v. Deters, 518 F.3d 375, 40 A.L.R.6th 693 (6th Cir. 2008).
Picketing or leafleting
U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); Occupy Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013).
Signs, banners, or billboards
U.S.—Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011); Act Now to Stop War and End Racism Coalition v. District of Columbia, 905 F. Supp. 2d 317 (D.D.C. 2012).
N.H.—Carlson's Chrysler v. City of Concord, 156 N.H. 399, 938 A.2d 69 (2007).

4 Cal.—Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126, 21 P.3d 797 (2001).

5 U.S.—Ross v. Early, 758 F. Supp. 2d 313 (D. Md. 2010).
Cal.—Showing Animals Respect and Kindness v. City of West Hollywood, 166 Cal. App. 4th 815, 83 Cal. Rptr. 3d 134 (2d Dist. 2008).
Speaker not entitled to most favored or cost-effective mode of communication

U.S.—Johnson v. City and County of Philadelphia, 665 F.3d 486 (3d Cir. 2011).

6 **Use of language other than English**

U.S.—Asian American Business Group v. City of Pomona, 716 F. Supp. 1328 (C.D. Cal. 1989).

7 **State constitution**

State constitutional speech protections apply equally to those proficient and not proficient in the English language.

Okla.—In re Initiative Petition No. 366, 2002 OK 21, 46 P.3d 123 (Okla. 2002).

8 Cal.—Briscoe v. Reader's Digest Association, Inc., 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34, 57 A.L.R.3d 1 (1971) (overruled on other grounds by, Gates v. Discovery Communications, Inc., 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552 (2004)).

9 Cal.—Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843, 955 P.2d 469 (1998), as modified on denial of reh'g, (July 29, 1998).

10 Cal.—Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98 (1st Dist. 2010), as modified on denial of reh'g, (Feb. 24, 2010).

N.J.—State v. Chepilko, 405 N.J. Super. 446, 965 A.2d 190 (App. Div. 2009).

11 U.S.—Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); Johnson v. San Jacinto Jr. College, 498 F. Supp. 555 (S.D. Tex. 1980).

Twins

The rights of free speech and the rights of assembly are identical twins, no one master of the other.

Utah—State v. Chima, 23 Utah 2d 360, 463 P.2d 802 (1970).

As to freedom of assembly and petition, generally, see §§ 1134 et seq.

12 U.S.—Henrico Professional Firefighters Ass'n Local 1568 v. Board of Sup'rs of Henrico County, 649 F.2d 237 (4th Cir. 1981); U.S. v. International Business Machines Corp., 83 F.R.D. 92 (S.D. N.Y. 1979).

13 U.S.—Frudden v. Pilling, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014); Full Value Advisors, LLC v. S.E.C., 633 F.3d 1101 (D.C. Cir. 2011).

Cal.—Beeman v. Anthem Prescription Management, LLC, 58 Cal. 4th 329, 165 Cal. Rptr. 3d 800, 315 P.3d 71 (2013).

Neb.—State ex rel. Stenberg v. Moore, 258 Neb. 738, 605 N.W.2d 440 (2000).

S.C.—Disabato v. South Carolina Ass'n of School Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (2013).

Complementary components of individual freedom of mind

The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind protected by the First Amendment.

U.S.—Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).

Colo.—In re Hickenlooper, 2013 CO 62, 312 P.3d 153 (Colo. 2013).

14 U.S.—Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995); Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).

Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).

15 U.S.—Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233 (2d Cir. 2014), petition for certiorari filed, 135 S. Ct. 435, 190 L. Ed. 2d 327 (2014) and petition for certiorari filed, 135 S. Ct. 435, 190 L. Ed. 2d 327 (2014).

16 U.S.—Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Templeton, 954 F. Supp. 2d 1205 (D. Kan. 2013).

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16B C.J.S. Constitutional Law § 922

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 922. Form of free speech expression—Expressive conduct

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1497, 1500, 1526 to 1528, 1555, 1559, 1580

Free speech guaranties protect expressive conduct as well as spoken and written communications.

Free speech guaranties protect not only spoken and written communications but also symbolic or expressive conduct.[1] Pure speech is entitled to comprehensive protection under the First Amendment,[2] and conduct which simply and unobtrusively communicates an idea with the physical action element limited to the extent necessary to transmit the idea is pure expression, closely akin to pure speech, and is entitled to the same degree of protection, whether or not it is combined with other utterances which are pure speech.[3] First Amendment protection extends only to conduct that is inherently expressive.[4]

Generally, however, conduct[5] and speech mixed with conduct[6] may be more significantly regulated than pure speech. The constitutional right of free speech does not preclude regulation of conduct[7] even though protected speech is intermingled with the conduct.[8]

Not all conduct claimed to have a communicative purpose is protected as speech by the First Amendment.[9] Conduct does not become speech for First Amendment purposes merely because the person engaging in the conduct intends to express an idea,[10] and only conduct sufficiently imbued with elements of communication falls within the scope of the First Amendment.[11] Conduct is sufficiently expressive to merit First Amendment protection when the conduct was intended to convey a particularized message, and in the surrounding circumstances, there was a great likelihood that the message would be understood by those who viewed it.[12] If conduct requires explanatory speech to be understood, that is strong evidence that the conduct at issue is not so inherently expressive that it warrants protection under the First Amendment.[13]

Combined speech and action are protected where the dominant purpose of both the speech and action elements is communicative in nature.[14] As a person's activity moves from pure speech into the area of conduct, it requires less protection.[15] "Speech plus," in which the physical action element is more than merely a means to communicate an idea, is not entitled to the same degree of protection as pure speech[16] but may have some protection as within the ambit of the First Amendment.[17] The mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct.[18]

When the speech element is merely incidental to a course of conduct or activity, then the activity is not entitled to protection because of its speech element.[19]

CUMULATIVE SUPPLEMENT

Cases:

The First Amendment protects conduct only if it has an expressive purpose. U.S.C.A. Const.Amend. 1. Salmon v. Blesser, 802 F.3d 249 (2d Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); Baribeau v. City of Minneapolis, 596 F.3d 465 (8th Cir. 2010); Baker v. Schwarb, 40 F. Supp. 3d 881 (E.D. Mich. 2014).
Colo.—Hill v. Thomas, 973 P.2d 1246 (Colo. 1999), judgment aff'd, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).
Conn.—State v. Moulton, 310 Conn. 337, 78 A.3d 55 (2013).
Idaho—State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).
Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).
Protected expression distinguished from economic activity and nonexpressive conduct
U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).
Speech-in-fact requirement
Expressive conduct is accorded the same protection as actual speech; thus, certain nonverbal acts of communication, if sufficiently expressive or symbolic, will satisfy the speech-in-fact requirement.
U.S.—Heffernan v. City of Paterson, 2 F. Supp. 3d 563 (D.N.J. 2014).

2 U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).

3 U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

4 U.S.—Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006).

5 U.S.—Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).
Iowa—Millsap v. Cedar Rapids Civil Service Com'n, 249 N.W.2d 679 (Iowa 1977).

6 D.C.—Farina v. U.S., 622 A.2d 50 (D.C. 1993).
As to government restrictions on conduct, see § 958.

7 U.S.—Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).
Tex.—Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App. Austin 1977), writ refused, (Mar. 15, 1978).

8 La.—State v. Singleton, 404 So. 2d 1226 (La. 1981).
Wis.—State v. Eisenberg, 48 Wis. 2d 364, 180 N.W.2d 529 (1970).

9 U.S.—Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).
Idaho—State v. Korsen, 138 Idaho 706, 69 P.3d 126 (2003) (abrogated on other grounds by, Evans v. Michigan, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013)).

10 U.S.—Voting for America, Inc. v. Steen, 732 F.3d 382 (5th Cir. 2013).
Pa.—Com. v. Bricker, 542 Pa. 234, 666 A.2d 257 (1995).

11 U.S.—Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010); Baker v. Schwarb, 40 F. Supp. 3d 881 (E.D. Mich. 2014).
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).
Kan.—In re Hawver, 300 Kan. 1023, 339 P.3d 573 (2014).
Mont.—State v. Nye, 283 Mont. 505, 943 P.2d 96 (1997).

12 U.S.—Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984); Heffernan v. City of Paterson, 777 F.3d 147 (3d Cir. 2015); Voting for America, Inc. v. Steen, 732 F.3d 382 (5th Cir. 2013); Vivid Entertainment, LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014).
Colo.—Curious Theater Co. v. Colorado Dept. of Public Health and Environment, 216 P.3d 71 (Colo. App. 2008), judgment aff'd, 220 P.3d 544 (Colo. 2009).
Pa.—Com. v. Mayfield, 574 Pa. 460, 832 A.2d 418 (2003).
Tex.—Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

13 U.S.—Hightower v. City and County of San Francisco, 2014 WL 7336677 (N.D. Cal. 2014); Incredible Investments, LLC v. Fernandez-Rundle, 28 F. Supp. 3d 1272 (S.D. Fla. 2014).

14 **Boycott**
Boycott which was intended to secure compliance by both civic and business leaders with demands for equality and racial justice and which was supported by speeches and nonviolent picketing, with participants repeatedly encouraging others to join the cause, was a form of speech or conduct ordinarily entitled to protection under First and Fourteenth Amendments.
U.S.—N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

15 U.S.—California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972); Hiett v. U.S., 415 F.2d 664 (5th Cir. 1969).
Pa.—Rouse Philadelphia Inc. v. Ad Hoc '78, 274 Pa. Super. 54, 417 A.2d 1248 (1979).
Restriction more likely constitutionally permissible
U.S.—Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011); Maages Auditorium v. Prince George's County, Md., 4 F. Supp. 3d 752 (D. Md. 2014).

16 U.S.—Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio 1977).

17 U.S.—Smith v. Sheeter, 402 F. Supp. 624 (S.D. Ohio 1975).

18 U.S.—Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968) (abrogated on other grounds by, Hudgens v. N. L. R. B., 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976)).

19 Neb.—Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972).

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16B C.J.S. Constitutional Law § 923

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 923. Function and effect of free speech guaranty

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1491, 1493 to 1495, 1497 to 1503, 1526 to 1528, 1555, 1564, 1580

The guaranties of free speech and press are intended to assure the free exchange of ideas.

While freedom of speech protects an individual's interest in self-expression,[1] the major purpose of the protection given to speech and press is to assure free trade in ideas[2] for bringing about desired political and social changes[3] and to invite dispute.[4] The hallmark of the protection of free speech is to allow free trade in ideas, even ideas that the overwhelming majority of people might find distasteful or discomforting.[5] Thus, free speech may best serve its purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.[6]

Freedom of speech and of the press implies the right to freely utter and publish whatever a citizen may please with immunity from legal censure and punishment for the publication as long as it is not harmful in its character when tested by legal standards.[7] The Federal Constitution guarantees the right to hold views on controversial questions, to express such views, and to disseminate them to persons who may be interested.[8] Neither the federal nor the state government can take any action which might prevent

such free and general discussion of public matters as seems essential to prepare the people for an intelligent exercise of their rights as citizens.[9]

The freedom of speech and of the press guaranteed by the federal and state constitutions embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.[10] The right includes liberty of circulation[11] and distribution.[12] For instance, the operation of a bookstore, or the activity of selling books, is protected by the First Amendment.[13]

CUMULATIVE SUPPLEMENT

Cases:

State cannot sanction speech, consistent with First Amendment, solely on basis that it stirred people to anger, invited public dispute, or brought about condition of unrest. U.S.C.A. Const.Amend. 1. Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).
Wash.—State v. Kilburn, 151 Wash. 2d 36, 84 P.3d 1215 (2004), as amended, (Feb. 17, 2004).

2 U.S.—Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); Porter v. Califano, 592 F.2d 770 (5th Cir. 1979).
Conn.—State v. DeLoreto, 265 Conn. 145, 827 A.2d 671 (2003).
R.I.—Leddy v. Narragansett Television, L.P., 843 A.2d 481 (R.I. 2004).
Unfettered interchange in ideas
U.S.—Lane v. Franks, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014).
Ill.—Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 317 Ill. Dec. 855, 882 N.E.2d 1011 (2008).
Spread of political truth
(1) Freedom of speech is indispensable to the discovery and spread of political truth and the best test of truth is the power of thought to get itself accepted in the competition of the market.
U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).
(2) The freedom under the First Amendment to think as you will and to speak as you think is a means indispensable to the discovery and spread of political truth and is essential both to stable government and to political change.
Md.—Independent Newspapers, Inc. v. Brodie, 407 Md. 415, 966 A.2d 432 (2009).

3 U.S.—Lane v. Franks, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014); Milwaukee Deputy Sheriff's Ass'n v. Clarke, 574 F.3d 370 (7th Cir. 2009); Pest Committee v. Miller, 626 F.3d 1097 (9th Cir. 2010).
W. Va.—Wheeling Park Com'n v. Hotel and Restaurant Employees, Intern. Union, AFL-CIO, 198 W. Va. 215, 479 S.E.2d 876 (1996).

4 U.S.—Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

5 U.S.—Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013); U.S. v. Syring, 522 F. Supp. 2d 125 (D.D.C. 2007).

Cal.—D.C. v. R.R., 182 Cal. App. 4th 1190, 106 Cal. Rptr. 3d 399, 254 Ed. Law Rep. 305 (2d Dist. 2010), as modified, (Apr. 8, 2010).

6 U.S.—Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); Survivors Network of Those Abused by Priests, Inc. v. Joyce, 779 F.3d 785 (8th Cir. 2015).

7 U.S.—Smith v. Arkansas State Highway Emp., Local 1315, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).

Ind.—Morris v. City of Kokomo, 178 Ind. App. 56, 381 N.E.2d 510 (1978).

Kan.—State v. Huffman, 228 Kan. 186, 612 P.2d 630 (1980).

Decision in hands of individual

The constitutional right of free expression is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.

U.S.—Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

8 U.S.—Schneider v. Smith, 390 U.S. 17, 88 S. Ct. 682, 19 L. Ed. 2d 799 (1968).

9 U.S.—Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

Ind.—Jacob Weinberg News Agency, Inc. v. City of Marion, 163 Ind. App. 181, 322 N.E.2d 730 (1975).

10 U.S.—Thornhill v. State of Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

Neb.—State v. Radcliffe, 228 Neb. 868, 424 N.W.2d 608 (1988).

As to prior restraints on speech, generally, see §§ 936 et seq.

Punishment of protected speech prohibited

U.S.—Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006); Department of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Com'n, 760 F.3d 427 (5th Cir. 2014).

Mo.—State v. Wooden, 388 S.W.3d 522 (Mo. 2013).

N.H.—State v. Zidel, 156 N.H. 684, 940 A.2d 255 (2008)

Forbidding of protected speech prohibited

U.S.—Fairley v. Andrews, 578 F.3d 518 (7th Cir. 2009).

Distribution of news and ideas

Acceptable limitations of the freedom of speech and press must neither affect impartial distribution of news and ideas nor constitute a special burden on the press, nor deprive a free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

U.S.—Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

11 U.S.—Mishkin v. State of N. Y., 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

Tenn.—H & L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444, 12 A.L.R.4th 835 (Tenn. 1979).

12 U.S.—Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981).

Colo.—Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044 (Colo. 2002), as modified on denial of reh'g, (Apr. 29, 2002).

13 U.S.—Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969).

Cal.—Ebel v. City of Garden Grove, 120 Cal. App. 3d 399, 176 Cal. Rptr. 312 (4th Dist. 1981).

Sale of expressive material

A state constitution's guarantee of freedom of expression means that the state or local government may not treat those who sell expressive material more restrictively than those who sell other merchandise.

Or.—League of Oregon Cities v. State, 334 Or. 645, 56 P.3d 892 (2002), subsequent determination, 336 Or. 593, 87 P.3d 672 (2004) and subsequent determination, 338 Or. 57, 107 P.3d 626 (2005), opinion after grant of review, 339 Or. 186, 118 P.3d 256 (2005).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 924. Anonymity protected by free speech guaranty

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1581

The guaranty of freedom of the press protects the anonymity of publishers, printers, and distributors or printed matter.

The anonymity of publishers, printers, and distributors of printed matter is protected by the guaranty of freedom of the press,[1] and anonymity of speakers may be protected by the guaranty of freedom of speech when there is such a nexus between anonymity and speech that a bar on anonymity is tantamount to a prohibition of speech.[2] Accordingly, any governmental requirement that the identity of speakers be disclosed must be supported by a compelling governmental interest.[3] The worth of speech in terms of its capacity for informing the public does not depend on the identity or nature of its source,[4] and the identity of the source does not determine the level of protection the First Amendment affords speech.[5]

While, as a general matter, anonymous speech is protected by the First Amendment,[6] the right to speak anonymously is not absolute.[7] In particular, the right of anonymity is not applicable to defamatory speech.[8]

Footnotes

1 U.S—Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002).
Cal.—Schuster v. Municipal Court, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (4th Dist. 1980).
N.D.—State v. North Dakota Ed. Ass'n, 262 N.W.2d 731, 4 A.L.R.4th 724 (N.D. 1978).

2 U.S—Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978).
Chilling effect
Speech can be chilled when an individual whose speech relies on anonymity is forced to reveal his or her identity as a precondition to expression.
U.S.—Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008).
Protection from harassment and persecution
The right to speak anonymously derives from the principle that, to ensure a vibrant marketplace of ideas, some speakers must be allowed to withhold their identities to protect themselves from harassment and persecution.
N.J.—Juzwiak v. Doe, 415 N.J. Super. 442, 2 A.3d 428, 259 Ed. Law Rep. 724 (App. Div. 2010).
Form of expression
The First Amendment right to remain anonymous encompasses all forms of expression whether they be writings or recorded messages published over the telephone.
Cal.—Huntley v. Public Utilities Commission, 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).

3 Cal.—Huntley v. Public Utilities Commission, 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).
La.—State v. Fulton, 337 So. 2d 866 (La. 1976).
Mass.—Com. v. Dennis, 368 Mass. 92, 329 N.E.2d 706 (1975).
Payment for political advertisement
A statute providing that political advertising shall contain words "paid for by" followed by the name and address of the payor, or committee, organization, or association and its treasurer on whose behalf the communication appears, does not violate the First Amendment right of free speech.
Ky.—Morefield v. Moore, 540 S.W.2d 873 (Ky. 1976).

4 U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).
Identity not proper consideration
The identity of the speaker is usually not a proper consideration in regulating speech that is entitled to First Amendment protection.
Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).

5 Me.—Central Maine Power Co. v. Public Utilities Com'n, 1999 ME 119, 734 A.2d 1120 (Me. 1999).

6 U.S.—McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).
Mich.—Ghanam v. Does, 303 Mich. App. 522, 845 N.W.2d 128 (2014), appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).
Author's decision to remain anonymous
An author's decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment because the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.
S.C.—State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013).

7 D.C.—Solers, Inc. v. Doe, 977 A.2d 941 (D.C. 2009).
Mich.—Ghanam v. Does, 303 Mich. App. 522, 845 N.W.2d 128 (2014), appeal denied, 497 Mich. 930, 856 N.W.2d 691 (2014).
Pa.—Kuwait & Gulf Link Transport Co. v. Doe, 2014 PA Super 96, 92 A.3d 41 (2014).

8 Ill.—Hadley v. Doe, 2014 IL App (2d) 130489, 382 Ill. Dec. 75, 12 N.E.3d 75 (App. Ct. 2d Dist. 2014), appeal allowed, (Sept. 24, 2014).
Md.—Independent Newspapers, Inc. v. Brodie, 407 Md. 415, 966 A.2d 432 (2009).

N.H.—Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (2010).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 925. Effect of profit motive on free speech guarantee

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1535, 1600, 1640, 2070

Speech is protected under the First Amendment even if money is spent for it or if it is undertaken in the expectation of profit.

Speech is protected under the First Amendment even though money is spent to disseminate it as where it is published as a paid advertisement.[1] The mere fact that speech is undertaken in the expectation of profit[2] or that it is conducted in a business setting with a profit motive[3] does not deprive it of protection. Publication in a form that is sold for profit does not deprive speech of constitutional protection,[4] and speech which involves solicitation to purchase something or otherwise pay or contribute money is protected.[5]

Once a speaker engages in conduct which amounts to more than the right of free discussion comprehends, as when he or she undertakes the collection of funds or securing of subscriptions, a reasonable registration or identification requirement may be imposed.[6] Even in that case, the restriction must be applied in such a manner as not to intrude on the right of free speech.[7]

Footnotes

1 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).
Cal.—Robins v. Los Angeles County, 248 Cal. App. 2d 1, 56 Cal. Rptr. 853 (2d Dist. 1966).
As to First Amendment protection of advertising and other commercial speech, see §§ 941 et seq.

2 U.S.—Yurkew v. Sinclair, 495 F. Supp. 1248 (D. Minn. 1980).
Cal.—Spiritual Psychic Science Church v. City of Azusa, 39 Cal. 3d 501, 217 Cal. Rptr. 225, 703 P.2d 1119 (1985) (disapproved of on other grounds by, Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002)).
Books, newspapers, magazines published and sold for profit
N.J.—G.D. v. Kenny, 205 N.J. 275, 15 A.3d 300 (2011).
Degree of protection not diminished
The degree of First Amendment protection is not diminished merely because the protected expression is sold rather than given away.
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).

3 Cal.—People v. Orser, 31 Cal. App. 3d 528, 107 Cal. Rptr. 458 (1st Dist. 1973).
N.J.—Berg Agency v. Maplewood Tp., 163 N.J. Super. 542, 395 A.2d 261 (Law Div. 1978).

4 U.S.—City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).
Nev.—Erwin v. State, 111 Nev. 1535, 908 P.2d 1367, 44 A.L.R.5th 859 (1995).

5 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); New York Public Interest Research Group, Inc. v. Village of Roslyn Estates, 498 F. Supp. 922 (E.D. N.Y. 1979).

6 U.S.—Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

7 U.S.—Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 926. Right to listen and receive information

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1502

The freedom of speech and the press includes the right of access to information and ideas.

The First Amendment protects not just speech itself but the entire process of communication, including the exchange of ideas and information between speaker and listener.[1] The guaranty embraces a right of the public to have access to ideas and experiences,[2] and protects the interests of society as a whole, as well as those of the speaker and his or her audience.[3] The freedom of speech and press includes some freedom to listen,[4] to hear,[5] and to receive information and ideas[6] regardless of the social worth of the information or ideas.[7] The right of access is an essential part of the purpose of the Free Speech Clause of the First Amendment's to ensure that the individual citizen can effectively participate in and contribute to a republican system of self-government.[8] However, although the right to receive information is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, it is more narrow than the right of free speech from which it originates.[9] Thus, while the First Amendment protects an individual's right to speak on whatever subject he or she chooses, it does not protect an individual's right to receive information on every subject;[10] this is particularly so when an individual seeks access to government information.[11]

The First Amendment prohibits the government from limiting the stock of information available to members of the public.[12] Moreover, the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a state interest of the highest order.[13] Thus, in most instances, publication may not be constitutionally prohibited even though access to the particular information may properly be denied.[14]

CUMULATIVE SUPPLEMENT

Cases:

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. U.S.C.A. Const.Amend. 1. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Mont.—State ex rel. Missoulian v. Montana Twenty-First Judicial Dist. Court, Ravalli County, 281 Mont. 285, 933 P.2d 829 (1997).

2 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Community Communications Co., Inc. v. City of Boulder, Colo., 660 F.2d 1370 (10th Cir. 1981).
Fla.—State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904 (Fla. 1976).
Wash.—Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974).
Interests of audience
The First Amendment protects and promotes the interests of the audience, which has a primary interest in having information readily available to it, as well as the speaker.
U.S.—MacNamara v. City of New York, 275 F.R.D. 125 (S.D. N.Y. 2011).
Necessary predicate to meaningful exercise of rights
The First Amendment protects the right to receive information and ideas because this is a necessary predicate to the recipient's meaningful exercise of his or her own rights of speech, press, and political freedom.
Alaska—Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007).

3 U.S.—National Commission On Egg Nutrition v. F.T.C., 570 F.2d 157, 50 A.L.R. Fed. 1 (7th Cir. 1977).
Dual aspect
The right of freedom of speech and press has a dual aspect in that it benefits not only the speaker, writer, or publisher but also all citizens by reason of its function as a necessary factor in the maintenance of the American political system and society.
U.S.—Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).
Effect of restriction
A restriction on speech implicates the First Amendment not only because it restricts the speaker's right to speak but also because it restricts the recipient's right to hear the speech.
Md.—Nefedro v. Montgomery County, 414 Md. 585, 996 A.2d 850 (2010).

4 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).
Under state constitution
Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).
Reciprocal rights
When one person has a First Amendment right to speak, others hold a reciprocal right to receive the speech.
U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013); American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012).
Derivative right

The right to receive speech under the First Amendment is entirely derivative of the rights of the speaker.
U.S.—Pennsylvania Family Institute, Inc. v. Black, 489 F.3d 156 (3d Cir. 2007).

5 U.S.—Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982).
Mo.—Application of Maples, 563 S.W.2d 760 (Mo. 1978).

6 U.S.—Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982); Pickup v. Brown, 42 F. Supp. 3d 1347 (E.D. Cal. 2012), aff'd, 728 F.3d 1042 (9th Cir. 2013), opinion amended and superseded on denial of reh'g en banc, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2881, 189 L. Ed. 2d 833 (2014) and cert. denied, 134 S. Ct. 2871, 189 L. Ed. 2d 833 (2014) and petition for certiorari filed, 134 S. Ct. 2871, 189 L. Ed. 2d 833 (2014) and aff'd, 740 F.3d 1208 (9th Cir. 2014); Quatroche v. East Lyme Bd. of Educ., 604 F. Supp. 2d 403, 243 Ed. Law Rep. 670 (D. Conn. 2009).
Colo.—Curious Theater Co. v. Colorado Dept. of Public Health and Environment, 216 P.3d 71 (Colo. App. 2008), judgment aff'd, 220 P.3d 544 (Colo. 2009).
S.D.—Sioux Falls Argus Leader v. Miller, 2000 SD 63, 610 N.W.2d 76 (S.D. 2000).
Wash.—Bradburn v. North Cent. Regional Library Dist., 168 Wash. 2d 789, 231 P.3d 166 (2010).

Right to receive and view media, including videos

U.S.—First Time Videos, LLC v. Does 1-500, 276 F.R.D. 241, 80 Fed. R. Serv. 3d 106 (N.D. Ill. 2011).

7 U.S.—Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).
N.Y.—Figari v. New York Tel. Co., 32 A.D.2d 434, 303 N.Y.S.2d 245 (2d Dep't 1969).

8 U.S.—Courthouse News Service v. Planet, 750 F.3d 776 (9th Cir. 2014).

9 U.S.—Sheldon v. Grimes, 18 F. Supp. 3d 854 (E.D. Ky. 2014).

10 U.S.—Sheldon v. Grimes, 18 F. Supp. 3d 854 (E.D. Ky. 2014).

11 U.S.—Sheldon v. Grimes, 18 F. Supp. 3d 854 (E.D. Ky. 2014).

12 U.S.—First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).
Okla.—State ex rel. Oklahoma Bar Ass'n v. Porter, 1988 OK 114, 766 P.2d 958 (Okla. 1988).

13 U.S.—U.S. v. Aguilar, 515 U.S. 593, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995).

14 U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 927. Freedom of belief

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1498, 1502, 1503

A.L.R. Library

Constitutional Challenges to Compelled Speech—Particular Situations or Circumstances, 73 A.L.R.6th 281
Constitutional Challenges to Compelled Speech—General Principles, 72 A.L.R.6th 513.

The First Amendment protects freedom of thought.

At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.[1] The First Amendment right of communication of ideas presupposes a capacity to produce ideas, so that the power to produce ideas is fundamental to the right to communicate.[2] The Amendment protects freedom of thought,[3] and the government may not force a person to adopt or express a particular opinion,[4] to pay

a subsidy for speech to which he or she objects,[5] or to contribute money to support political or ideological causes,[6] at least without sufficient justification.[7] The right against compelled speech is not, and cannot be, restricted to ideological messages.[8] The mandatory funding of expressive activities, however, does not always constitute compelled speech in violation of the First Amendment.[9] For instance, requiring an attorney to be a member of a bar association[10] or to take an oath to support federal and state law[11] does not violate the attorney's free speech rights.

CUMULATIVE SUPPLEMENT

Cases:

Under exacting scrutiny test for the compulsory subsidization of commercial speech, which is a less demanding test than the strict scrutiny that might be thought to apply outside the commercial sphere, a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

2 U.S.—Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

3 U.S.—Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); New Jersey-Philadelphia Presbytery of Bible Presbyterian Church v. New Jersey State Bd. of Higher Educ., 514 F. Supp. 506 (D.N.J. 1981).

Right to think is the beginning of freedom

The right to think is the beginning of freedom; speech must be protected from the government through the First Amendment because speech is the beginning of thought.

Tex.—Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

Refusal to foster objectionable idea

The First Amendment protects the right of individuals to hold points of view different from the majority and to refuse to foster an idea they find morally objectionable.

U.S.—Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977).

4 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); U.S. v. United Foods, Inc., 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001); Grote Industries, LLC v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012), injunction pending appeal granted, 708 F.3d 850 (7th Cir. 2013).

Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).

Government may not compel endorsement of ideas that it approves

U.S.—Harris v. Quinn, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

Third party newsletter

An order of a Public Utilities Commission compelling a utility to place a newsletter containing the views of a third party in its billing envelopes both penalized the utility's expression of particular points of view and forced the utility to alter its speech to conform with an agenda which it did not set, and those impermissible effects on the utility's First Amendment rights were not remedied by the fact that the Commission determined that it was ratepayers, not the utility, which owned the "extra space" in the billing envelope.

U.S.—Pacific Gas and Elec. Co. v. Public Utilities Com'n of California, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986).

5 U.S.—Harris v. Quinn, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014); Knox v. Service Employees Intern. Union, Local 1000, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

Strict scrutiny

(1) Any attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny under the Free Speech Clause of the First Amendment.

U.S.—R.J. Reynolds Tobacco Co. v. Food and Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012) (overruled on other grounds by, American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18 (D.C. Cir. 2014)).

(2) Compulsory subsidies for private speech are subject to exacting First Amendment scrutiny.

U.S.—Wilkins v. Daniels, 744 F.3d 409 (6th Cir. 2014).

6 Cal.—Smith v. Regents of University of California, 4 Cal. 4th 843, 16 Cal. Rptr. 2d 181, 844 P.2d 500, 80 Ed. Law Rep. 248 (1993), as modified on denial of reh'g, (Apr. 15, 1993).

7 U.S.—Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997).

8 U.S.—Frudden v. Pilling, 742 F.3d 1199, 302 Ed. Law Rep. 21 (9th Cir. 2014).

9 U.S.—Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997).

10 N.H.—Petition of Tocci, 137 N.H. 131, 624 A.2d 548 (1993).

11 R.I.—In re Roots, 762 A.2d 1161 (R.I. 2000).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

1. Introduction to Free Speech

§ 928. Duty of courts to protect free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490 to 1507, 1509 to 1529, 1545

A.L.R. Library

First Amendment Protection Afforded to Blogs and Bloggers, 35 A.L.R.6th 407.
First Amendment Protection Afforded to Web Site Operators, 30 A.L.R.6th 299.

The courts have the duty to preserve intact guaranties of freedom of speech and liberty of press and to prescribe the bounds beyond which they must not be permitted to go.

The judicial branch of the government has the duty to preserve intact guaranties of freedom of speech and liberty of press and to prescribe the bounds beyond which they must not be permitted to go.[1]

Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it,[2] as well as the category into which a specific type of property falls.[3] When a regulation implicates First Amendment rights, the constitutional validity of the restriction is determined by balancing the First Amendment interest against the State's legitimate interest in regulating the activity in issue.[4] Where particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of freedom of speech, the court must determine which of the two conflicting interests demands the greater protection under the particular circumstances presented.[5] In every case where legislative abridgement of the rights of freedom of speech and freedom of press is asserted, the court should examine the effects of the challenged legislation,[6] look through form to substance,[7] and weigh the circumstances and appraise the substantiality of the reasons advanced in support of the challenged regulations.[8] Each medium of expression must be assessed for the First Amendment purposes by the standards suited for it, for each may present its own problems.[9] The law or action which may interfere with rights of free speech or press must be carefully scrutinized,[10] and the court must determine whether the governmental restriction of speech bears a reasonable relationship to the achievement of a legitimate governmental purpose.[11]

The invalidity of a statute as infringing the right of freedom of speech is to be determined on its face,[12] and each case with respect to an alleged invasion of the constitutional right of freedom of speech must be determined on its individual facts.[13] In conducting a First Amendment inquiry, courts focus not on the audience but on the nature of the information.[14]

Claims under the Free Speech Clause of the First Amendment are analyzed in three steps: first, the court must decide whether the activity at issue is speech protected by the First Amendment; second, assuming the activity is protected speech, the court must identify the nature of the forum because the extent to which the government may limit access depends on whether the forum is public or nonpublic; and third, the court must assess whether the government's justifications for restricting speech in the relevant forum satisfy the requisite standard.[15]

CUMULATIVE SUPPLEMENT

Cases:

The First Amendment directs courts to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. U.S.C.A. Const.Amend. 1. Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Faulkner v. Clifford, 289 F. Supp. 895 (E.D. N.Y. 1968).
Mo.—Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

2 U.S.—Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).

3 Ind.—State v. Economic Freedom Fund, 959 N.E.2d 794 (Ind. 2011).
Wash.—Sanders v. City of Seattle, 160 Wash. 2d 198, 156 P.3d 874 (2007).

4 Cal.—Broadman v. Commission on Judicial Performance, 18 Cal. 4th 1079, 77 Cal. Rptr. 2d 408, 959 P.2d 715 (1998), as modified, (Sept. 2, 1998).

5 U.S.—American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976); Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975).
Cal.—Aaron v. Municipal Court, 73 Cal. App. 3d 596, 140 Cal. Rptr. 849 (1st Dist. 1977).
Tex.—Palmer v. Unauthorized Practice Committee of State Bar of Tex., 438 S.W.2d 374 (Tex. Civ. App. Houston 14th Dist. 1969).

6 U.S.—Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943); Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981), on reh'g, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982).

7 U.S.—Allied Artists Pictures Corp. v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976).

8 U.S.—American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).
Me.—Unit B, Kittery Teachers Ass'n v. Kittery School Committee, 413 A.2d 534 (Me. 1980).

9 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Muir v. Alabama Educational Television Com'n, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982).
Colo.—People v. Weeks, 197 Colo. 175, 591 P.2d 91 (1979).

Basic principles do not vary with appearance of new and different media

U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); U.S. v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011).

10 U.S.—CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); P. A. M. News Corp. v. Butz, 514 F.2d 272 (D.C. Cir. 1975).
Fla.—In re Adoption of Proposed Local Rule 17 of Criminal Division of Circuit Court of Eleventh Judicial Circuit, 339 So. 2d 181 (Fla. 1976).
Mass.—Com. v. A Juvenile, 368 Mass. 580, 334 N.E.2d 617 (1975).

Strictest form of scrutiny

The First Amendment requires that the strictest form of scrutiny be applied where the purpose of a statute is related to suppression of the free expression of ideas or information.

U.S.—Community-Service Broadcasting of Mid-America, Inc. v. F.C.C., 593 F.2d 1102 (D.C. Cir. 1978).

11 Okla.—State ex rel. Dept. of Transp. v. Pile, 1979 OK 152, 603 P.2d 337 (Okla. 1979).

12 U.S.—Carlson v. People of State of Cal., 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940).

13 U.S.—U.S. v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973).
Colo.—Hamilton v. City of Montrose, 109 Colo. 228, 124 P.2d 757 (1942).

Review of facts

In cases involving free expression, the Supreme Court has the obligation not only to formulate principles of general application but also to review the facts to insure that the speech involved is not protected under federal law; the court must make an independent examination of the whole record to assure itself that a judgment does not constitute a forbidden intrusion on the field of free expression.

U.S.—Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974); Leverington v. City of Colorado Springs, 643 F.3d 719 (10th Cir. 2011).

14 U.S.—Wilcoxon v. Red Clay Consolidated School Dist. Bd. of Educ., 437 F. Supp. 2d 235, 211 Ed. Law Rep. 264 (D. Del. 2006).

15 U.S.—Bible Believers v. Wayne County, 765 F.3d 578 (6th Cir. 2014); Boardley v. U.S. Dept. of Interior, 615 F.3d 508 (D.C. Cir. 2010); Juracek v. City of Detroit, 994 F. Supp. 2d 853 (E.D. Mich. 2014); Wandering Dago Inc. v. New York State Office of General Services, 992 F. Supp. 2d 102 (N.D. N.Y. 2014).
N.H.—State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014) (claims under New Hampshire Constitution).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

2. Source of Right

§ 929. Source of free speech right, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1493, 1498

Freedom of speech and of the press are guaranteed by the federal and state constitutions.

The freedoms of speech and press are guaranteed against invasion by the federal government by the First Amendment to the Constitution of the United States,[1] and they are protected against infringement by the state governments by similar guaranties in state constitutions[2] as well as the Fourteenth Amendment.[3]

Some state constitutions provide broader protection of speech and expressive activity than the First Amendment.[4] Under others, the freedoms are coextensive with, or no broader or more restrictive than, those provided by the First Amendment.[5] Most state courts analyze the state constitutional provisions under First Amendment principles[6] although this is not always necessarily the case.[7]

CUMULATIVE SUPPLEMENT

Cases:

The sensitivity and significance of the interests presented in clashes between First Amendment protection of speech and state-law rights counsel that courts rely on limited principles that sweep no more broadly than the appropriate context of the instant case. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

State constitution provides broader protections for free speech than the First Amendment. U.S. Const. Amend. 1; Ariz. Const. art. 2, § 6. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

While the language of the New York Constitution's free speech clause is more expansive than that contained in the First Amendment of the U.S. Constitution, that does not automatically mean that the New York Constitution will necessarily be interpreted to confer greater rights than those conferred by the First Amendment in every case. U.S. Const. Amend. 1; N.Y. Const. art. 1, § 8. Dua v. New York City Department of Parks and Recreation, 176 A.D.3d 91, 108 N.Y.S.3d 113 (1st Dep't 2019).

[END OF SUPPLEMENT]

Footnotes

1 Idaho—Edmondson v. Shearer Lumber Products, 139 Idaho 172, 75 P.3d 733, 7 A.L.R.6th 841 (2003).
Wash.—State v. Riles, 135 Wash. 2d 326, 957 P.2d 655 (1998) (abrogated on other grounds by, State v. Valencia, 169 Wash. 2d 782, 239 P.3d 1059 (2010)).

2 Cal.—Los Angeles Alliance For Survival v. City of Los Angeles, 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (2000).
N.J.—State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 733 A.2d 1159 (1999).
Or.—State v. Rangel, 328 Or. 294, 977 P.2d 379 (1999).
Tenn.—Doe v. Doe, 127 S.W.3d 728 (Tenn. 2004).

3 § 930.

4 U.S.—ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490 (2d Cir. 2013) (interpreting New York Law).
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).
Cal.—Beeman v. Anthem Prescription Management, LLC, 58 Cal. 4th 329, 165 Cal. Rptr. 3d 800, 315 P.3d 71 (2013).
N.J.—Borough of Sayreville v. 35 Club L.L.C., 208 N.J. 491, 33 A.3d 1200 (2012).

5 Haw.—State v. Viglielmo, 105 Haw. 197, 95 P.3d 952 (2004).
Me.—City of Bangor v. Diva's, Inc., 2003 ME 51, 830 A.2d 898 (Me. 2003).
Minn.—Tatro v. University of Minnesota, 816 N.W.2d 509, 281 Ed. Law Rep. 1224 (Minn. 2012).
Neb.—State ex rel. Bruning v. Gale, 284 Neb. 257, 817 N.W.2d 768 (2012).

6 Haw.—Oahu Publications Inc. v. Ahn, 133 Haw. 482, 331 P.3d 460 (2014), as corrected, (Aug. 5, 2014).
Mass.—Hosford v. School Committee of Sandwich, 421 Mass. 708, 659 N.E.2d 1178, 106 Ed. Law Rep. 313 (1996).
Minn.—Tatro v. University of Minnesota, 816 N.W.2d 509, 281 Ed. Law Rep. 1224 (Minn. 2012).

7 Md.—State v. Brookins, 380 Md. 345, 844 A.2d 1162 (2004).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

2. Source of Right

§ 930. Fourteenth Amendment as source of free speech right

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1493, 1498

Freedom of speech and of the press is protected against infringement by state action by the Due Process Clause of the Fourteenth Amendment; but the constitutional guaranty does not deprive the states of the right of self-preservation.

While the First Amendment to the Federal Constitution is a limitation on Congress only,[1] the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects freedom of speech and of the press against infringement by state action.[2] Freedom of speech and of the press is embraced within the fundamental personal rights and liberties protected by the Due Process Clause of the Fourteenth Amendment.[3] For instance, municipal ordinances adopted under state authority constitute state action and are within the prohibition of the Amendment.[4]

CUMULATIVE SUPPLEMENT

Cases:

The Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States. U.S. Const. Amends. 1, 14. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 (2019).

[END OF SUPPLEMENT]

Footnotes

1 § 918.

2 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Peterson v. City of Florence, Minn., 727 F.3d 839 (8th Cir. 2013); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010); Ransom v. Carbondale Area School Dist., 982 F. Supp. 2d 397, 304 Ed. Law Rep. 884 (M.D. Pa. 2013).
Cal.—Wilson v. San Luis Obispo County Democratic Cent. Committee, 175 Cal. App. 4th 489, 96 Cal. Rptr. 3d 332 (2d Dist. 2009), as modified on denial of reh'g, (June 29, 2009).
N.H.—State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014).
N.D.—State v. Backlund, 2003 ND 184, 672 N.W.2d 431 (N.D. 2003).
Tex.—State v. Johnson, 425 S.W.3d 542 (Tex. App. Tyler 2014), petition for discretionary review granted, (Apr. 9, 2014).

3 U.S.—Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970).
Ga.—Walter v. State, 131 Ga. App. 667, 206 S.E.2d 662 (1974).
Violation of First Amendment
Because the Due Process Clause extends the protections of the First Amendment to state and local government, any infringement of an individual's free speech rights by a state or local government violates the First Amendment rather than the Fourteenth.
Tenn.—State v. Mitchell, 343 S.W.3d 381 (Tenn. 2011).

4 U.S.—Southeastern Promotions, Limited v. City of Atlanta, Ga., 334 F. Supp. 634 (N.D. Ga. 1971); Levers v. City of Tullahoma, Tenn., 446 F. Supp. 884 (E.D. Tenn. 1978).

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16B C.J.S. Constitutional Law § 931

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

3. Subjects of Free Speech and Press

§ 931. Subjects of free speech and press, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1494, 1495, 1497, 1499 to 1503, 1512, 1517, 1526 to 1528, 1535, 1545, 1600, 1624, 1635, 1640, 1670, 1675, 1681, 1725, 1775, 1780, 1790, 1795, 1800, 1845, 1850, 1860, 1885, 1926, 2035, 2041, 2050, 2070, 2085, 2100, 2180

The right of free speech and free press guaranteed by constitutional provisions extends to all subjects which affects ways of life, without limitation to any particular field of human interest, and includes in the main freedom of expression on political, sociological, religious, and economic subjects.

The right of free speech and a free press guaranteed by constitutional provisions is not confined to any particular field of human interest.[1] All ideas having even the slightest redeeming social importance, including those concerning the advancement of truth, science, morality, and arts, have the full protection of the First Amendment.[2] Although the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern is at the heart of the First Amendment,[3] the Amendment's guaranties are not the preserve of the political expression or comment upon public affairs,[4] and they extend to all subjects which affect ways of life.[5]

Speech protected by First Amendment includes free expression or exchange of ideas, communication of information or opinions, and dissemination and propagation of views and ideas, as well as advocacy of causes.[6] The constitutional guaranty includes mainly freedom of expression on political, sociological, religious, and economic subjects.[7] The First Amendment free speech clause protects even dry information, devoid of advocacy, political relevance, or artistic expression.[8] The protection of the guaranty is not wholly inapplicable to business or economic activity,[9] and it covers to a considerable degree commercial speech which is related solely to the economic interests of speaker and audience,[10] but it does not extend to commercial activities to which speech is only an incident or means.[11] The constitutional right to speak is not limited to speaking the truth,[12] and the right of immunity from previous restraints on freedom of speech and of the press extends to false statements as well as true ones.[13] Although false statements are not protected by the First Amendment in the same manner as truthful statements,[14] erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive.[15]

CUMULATIVE SUPPLEMENT

Cases:

Under the First Amendment, the Government may not suppress lawful speech as the means to suppress unlawful speech. U.S.C.A. Const.Amend. 1. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

Speech in aid of pharmaceutical marketing is a form of expression protected by the Free Speech Clause of the First Amendment. U.S.C.A. Const.Amend. 1. Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

Speech on matters of public concern is at the heart of the First Amendment's protection. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).
N.Y.—DeVore v. Time, Inc., 73 Misc. 2d 240, 341 N.Y.S.2d 726 (Sup 1971).

2 Cal.—DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 4 Cal. Rptr. 3d 69, 75 P.3d 1 (2003), as modified, (Oct. 15, 2003).
N.J.—R.M. v. Supreme Court, 185 N.J. 208, 883 A.2d 369 (2005).

3 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Smith v. Gilchrist, 749 F.3d 302 (4th Cir. 2014).
R.I.—Leddy v. Narragansett Television, L.P., 843 A.2d 481 (R.I. 2004).

4 U.S.—Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).
Cal.—Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981).
As to protection of political speech, see § 933.
Difficult to distinguish politics from entertainment
While the Free Speech Clause exists principally to protect discourse on public matters, it is difficult to distinguish politics from entertainment and dangerous to try.
U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

5 N.H.—State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941), aff'd, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

6 Neb.—State v. Monastero, 228 Neb. 818, 424 N.W.2d 837 (1988).

7 U.S.—Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Sixteenth of September Planning Committee, Inc. v. City and County of Denver, Colo., 474 F. Supp. 1333 (D. Colo. 1979).

Factual matter

Purely factual matter of public interest may claim First Amendment protection.

U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

Local as well as federal matters

Freedom of speech under the First Amendment is as extensive with respect to discussion relating to matters of local as to matters of federal concern.

U.S.—United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

8 U.S.—IMS Health Inc. v. Sorrell, 630 F.3d 263 (2d Cir. 2010), aff'd, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

9 Cal.—In re Porterfield, 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946).

10 § 941.

11 Cal.—In re Porterfield, 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946).

Commercial sex

Speech for the purpose of sexual activity for hire is not constitutionally protected.

D.C.—U. S. v. Moses, 339 A.2d 46 (D.C. 1975).

Mo.—State v. Roberts, 779 S.W.2d 576 (Mo. 1989).

12 Mont.—State v. Woods, 221 Mont. 17, 716 P.2d 624 (1986).

13 Ill.—Montgomery Ward & Co. v. United Retail, Wholesale & Dept. Store Employees of America, CIO, 330 Ill. App. 49, 70 N.E.2d 75 (1st Dist. 1946), judgment aff'd, 400 Ill. 38, 79 N.E.2d 46 (1948).

14 Ala.—Ex parte Wright, 2014 WL 5311314 (Ala. 2014).

Mich.—In re Chmura, 461 Mich. 517, 608 N.W.2d 31 (2000).

False or misleading speech enjoys diminished protection

U.S.—Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009).

Fraudulent statements

U.S.—U.S. v. Alvarez, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

Md.—Nefedro v. Montgomery County, 414 Md. 585, 996 A.2d 850 (2010).

15 Ala.—Butler v. Alabama Judicial Inquiry Com'n, 802 So. 2d 207 (Ala. 2001).

Minn.—State v. Crawley, 819 N.W.2d 94 (Minn. 2012), cert. denied, 133 S. Ct. 1493, 185 L. Ed. 2d 548 (2013).

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16B C.J.S. Constitutional Law § 932

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

3. Subjects of Free Speech and Press

§ 932. Nature of ideas expressed

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1495, 1497, 1499, 1500, 1507, 1517, 1526 to 1528, 1545, 1600, 1624, 1635, 1640, 1670, 1675, 1681, 1725, 1775, 1780, 1790, 1795, 1800, 1845, 1850, 1860, 1885, 1926, 2035, 2041, 2050, 2070, 2085, 2100, 2180

A.L.R. Library

Validity, and Standing to Challenge Validity, of State Statute Prohibiting Flag Desecration and Misuse, 31 A.L.R.6th 333.

Freedom of speech and the press is not limited by the nature of the ideas expressed.

The First Amendment protects expression, popular or not.[1] The constitutional protections of speech and press do not turn on the truth, popularity, or social utility of the ideas and beliefs which are offered,[2] but embody a commitment that debate on public issues should be uninhibited, robust, and wide open,[3] as it is the essence of self-government.[4] Expression of opinion is entitled

to protection no matter how unorthodox or abhorrent the opinion may seem to others[5] and even though the ideas expressed may be rejected by the majority.[6] Speech is protected even though it promotes ideas which are contrary to public policy[7] or to community customs and traditions[8] or concerns subjects offending sensibilities.[9] The point of all speech protection under the First Amendment is to shield choices of content that in someone's eyes are misguided or even hurtful.[10]

The freedom of speech and of the press does not bear an inverse ratio to the timeliness and importance of the ideas seeking expression.[11] Since it is a fundamental purpose of the First Amendment to foreclose governmental control or manipulation of the sentiments uttered to the public,[12] the government may not allow freedom of speech and press to those on one side of a controversy and restrict those on the other[13] or restrict the speech of some elements of society in order to enhance the voice of others.[14] That is, the State may not burden the speech of others in order to tilt public debate in a preferred direction.[15] there is no threat to the free and robust debate of public issues, there is no potential interference with a meaningful dialogue of ideas, and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import.[16]

CUMULATIVE SUPPLEMENT

Cases:

The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1. Matal v. Tam, 137 S. Ct. 1744 (2017).

Disgust is not valid basis for restricting expression. U.S.C.A. Const.Amend. 1. Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

Not all speech is of equal First Amendment importance, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous, because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest; there is no threat to the free and robust debate of public issues, there is no potential interference with a meaningful dialogue of ideas, and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

In public debate, insulting and even outrageous speech must be tolerated, in order to provide adequate breathing space to the freedoms protected by the First Amendment. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

First Amendment guarantees that all citizens shall be free to speak their piece on the issues of the day, and that government cannot meddle in the debate that takes place among the governed. U.S. Const. Amend. 1. Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

Corruption is limited to quid pro quo corruption, or its appearance, under the important state interest analysis used to determine whether limits on campaign contribution amounts violate free speech protections of the First Amendment. U.S.C.A. Const.Amend. 1; MCA 13–37–216. Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554, 82 A.L.R.5th 625 (2000).

2 U.S.—New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964); Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982); Animal Legal Defense Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014).

Cal.—Huntley v. Public Utilities Commission, 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).

Protection not dependent on acceptability

U.S.—Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

3 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Cal.—In re Kay, 1 Cal. 3d 930, 83 Cal. Rptr. 686, 464 P.2d 142 (1970).

Wash.—Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974).

Wyo.—Operation Save America v. City of Jackson, 2012 WY 51, 275 P.3d 438 (Wyo. 2012).

Open marketplace

The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.

U.S.—Knox v. Service Employees Intern. Union, Local 1000, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

4 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

5 U.S.—Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969); Kirksey v. City of Jackson, Mississippi, 663 F.2d 659 (5th Cir. 1981), decision clarified on denial of reh'g, 669 F.2d 316 (5th Cir. 1982).

Me.—State v. John W., 418 A.2d 1097, 14 A.L.R.4th 1238 (Me. 1980).

Tex.—Iranian Muslim Organization v. City of San Antonio, 615 S.W.2d 202 (Tex. 1981).

Unsettling tendencies

Because speech is often provocative and challenging, and may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea, freedom of speech is protected against censorship or punishment.

U.S.—Cox v. State of La., 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); Bell v. Itawamba County School Bd., 774 F.3d 280, 312 Ed. Law Rep. 550 (5th Cir. 2014), reh'g en banc granted, 2015 WL 1636735 (5th Cir. 2015).

6 U.S.—Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973).

Cal.—Huntley v. Public Utilities Commission, 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).

Necessary cost of freedom

Many are those who must endure speech they do not like, but that is a necessary cost of freedom.

U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

Standards of acceptability

An individual's speech is protected even if it does not meet standards of acceptability from the potential audience's view.

U.S.—Bays v. City of Fairborn, 668 F.3d 814 (6th Cir. 2012).

Flag

The constitutionally guaranteed freedom to be intellectually diverse and even contrary and the right to differ as to things that touch the heart of the existing order encompass freedom to express publicly one's opinions about the flag, including those opinions which are defiant or contemptuous.

U.S.—Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969).

7 Ohio—City of Cincinnati v. Black, 8 Ohio App. 2d 143, 37 Ohio Op. 2d 28, 220 N.E.2d 821 (1st Dist. Hamilton County 1966).

Racial overtones

The fact that a statement had racial overtones did not constitute a reason for holding it outside the protection of the First Amendment forbidding abridgement of freedom of speech.

U.S.—Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

8 U.S.—Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

Nazis

U.S.—Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980).

9 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

Insulting or outrageous speech

In public debate, insulting and even outrageous speech must be tolerated in order to provide adequate breathing space to the freedoms protected by the First Amendment.

U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

10 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

11 U.S.—Bridges v. State of Cal., 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192, 159 A.L.R. 1346 (1941).

Idaho—Uranga v. Federated Publications, Inc., 138 Idaho 550, 67 P.3d 29 (2003).

12 U.S.—Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975).

Marketplace testing preferred

The First Amendment generally favors marketplace testing of ideas and information rather than their arbitrary control by government.

U.S.—Porter v. Califano, 592 F.2d 770 (5th Cir. 1979).

13 U.S.—First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

Minn.—Minnesota Fifth Congressional Dist. Independent-Republican Party v. State ex rel. Spannaus, 295 N.W.2d 650 (Minn. 1980).

14 U.S.—Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

15 U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

Matters of purely private significance.

Not all speech is of equal First Amendment importance, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest;

U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Conn.—Gleason v. Smolinski, 149 Conn. App. 283, 88 A.3d 589 (2014).

16 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

3. Subjects of Free Speech and Press

§ 933. Political speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1495, 1497 to 1500, 1507, 1517, 1526 to 1528, 1545, 1550, 1553, 1555, 1564, 1681, 1687, 1845, 1850, 1851, 1860, 1866, 2070

A.L.R. Library

Constitutionality, Construction, and Application of Statute or Regulatory Activity Respecting Political Advertising Nonprint Media Cases, or Cases Implicating Both Print and Nonprint Media, 53 A.L.R.6th 491.
Constitutionality, Construction, and Application of Statute or Regulatory Action Respecting Political Advertising—Print Media Cases, 51 A.L.R.6th 359.
Validity of Restrictions Imposed During National Political Conventions Impinging Upon Rights to Freedom of Speech and Assembly Under First Amendment, 46 A.L.R.6th 465.
Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees, 24 A.L.R.6th 179.
Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases, 19 A.L.R. Fed. 2d 1.

The protection of political speech is a primary function of the guaranty of freedom of speech.

The protection of political speech is a primary function of the guaranty of freedom of speech.[1] The First Amendment is intended to protect the free discussion of governmental affairs,[2] including discussion of candidates, structures and form of government, the manner in which the government is operated, and all similar matters relating to political processes.[3] Freedom of speech encompasses the right to criticize the government and its officers;[4] to express disagreement with government policy, whether on the national, state, or local level;[5] and changes in the laws and constitution by peaceful and lawful means may be advocated.[6]

The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.[7]

Criticism of the official conduct of public officers is protected even though the criticism is effective in diminishing their reputations and even though it is untrue if it is not published with legal malice, that is, with knowledge that it is false, or with reckless disregard whether it is false or true,[8] and may not, therefore, be the basis for a civil or criminal action for defamation.[9] Claims of government corruption, maladministration, or misuse of funds fall squarely within the First Amendment.[10] Moreover, the American system of government and the government itself may be criticized even though the speaking or writing of such criticism may undermine confidence in the government or cause or increase discontent with it.[11]

Laws that burden political speech are subject to strict scrutiny for a violation of the First Amendment, which level of scrutiny requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.[12]

Political speech does not lose First Amendment protection simply because its source is a corporation.[13]

Footnotes

1 U.S.—Kirksey v. City of Jackson, Mississippi, 663 F.2d 659 (5th Cir. 1981), decision clarified on denial of reh'g, 669 F.2d 316 (5th Cir. 1982); 281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014), cert. denied, 135 S. Ct. 1550 (2015).
Ariz.—Arizona Citizens Clean Elections v. Brain, 233 Ariz. 280, 311 P.3d 1093 (Ct. App. Div. 1 2013), review granted in part, (Nov. 26, 2013).
Nev.—Del Papa v. Steffen, 112 Nev. 369, 915 P.2d 245 (1996).
Political speech is core First Amendment speech
U.S.—Moss v. U.S. Secret Service, 711 F.3d 941 (9th Cir. 2013).
Highest level of protection
N.J.—Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 103 A.3d 249 (2014).
Pinnacle of protected speech
Ky.—Doe v. Coleman, 436 S.W.3d 207 (Ky. Ct. App. 2014).

2 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).
Colo.—In re Green, 11 P.3d 1078 (Colo. 2000).
Vt.—Vermont Soc. of Ass'n Executives v. Milne, 172 Vt. 375, 779 A.2d 20 (2001).
Purpose to ensure effective citizen participation in republican government
U.S.—Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012), cert. denied, 133 S. Ct. 1634, 185 L. Ed. 2d 616 (2013).

3 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

Ariz.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

Me.—Mowles v. Commission on Governmental Ethics and Election Practices, 2008 ME 160, 958 A.2d 897, 51 A.L.R.6th 705 (Me. 2008).

N.J.—Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 46 A.3d 507 (2012).

4 U.S.—Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966); Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974).

N.J.—Matter of Hinds, 90 N.J. 604, 449 A.2d 483 (1982).

Wash.—State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee, 135 Wash. 2d 618, 957 P.2d 691 (1998).

5 N.J.—Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 993 A.2d 805, 256 Ed. Law Rep. 826 (2010).

6 U.S.—New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

N.Y.—Matter of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202 (2d Dep't 1944).

7 U.S.—Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Green Party of Connecticut v. Garfield, 616 F.3d 189 (2d Cir. 2010); Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013); Fund For Louisiana's Future v. Louisiana Bd. of Ethics, 17 F. Supp. 3d 562 (E.D. La. 2014).

8 U.S.—New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

Misleading or inaccurate speech protected

D.C.—Mallof v. District of Columbia Bd. of Elections and Ethics, 1 A.3d 383 (D.C. 2010).

9 § 1051.

10 U.S.—Marez v. Bassett, 595 F.3d 1068 (9th Cir. 2010).

11 U.S.—Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966); Straut v. Calissi, 293 F. Supp. 1339 (D.N.J. 1968).

12 U.S.—Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Carey v. Federal Election Com'n, 791 F. Supp. 2d 121 (D.D.C. 2011).

N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

W. Va.—State ex rel. Loughry v. Tennant, 229 W. Va. 630, 732 S.E.2d 507 (2012).

Government interest in preventing corruption as compelling justification

U.S.—New York Progress and Protection PAC v. Walsh, 733 F.3d 483 (2d Cir. 2013); Stop This Insanity, Inc. Employee Leadership Fund v. Federal Election Com'n, 902 F. Supp. 2d 23 (D.D.C. 2012), aff'd, 761 F.3d 10 (D.C. Cir. 2014); Fund For Louisiana's Future v. Louisiana Bd. of Ethics, 17 F. Supp. 3d 562 (E.D. La. 2014).

13 U.S.—Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

3. Subjects of Free Speech and Press

§ 934. Incitement to action

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1491, 1495, 1497, 1500, 1502, 1504, 1507, 1517, 1526 to 1528, 1529

Vigorous advocacy of lawful ends is protected under the constitutional guaranty of free speech, but expressive conduct is not protected to the same extent as pure speech.

The constitutional guaranty of free speech extends to more than abstract discussion unrelated to action, but free trade in ideas means free trade and the opportunity to persuade to action, not merely to describe facts,[1] so that vigorous advocacy of lawful ends is protected.[2] Protection is not limited to the cognitive content of speech;[3] words selected for their emotive quality are also protected.[4] The fear that speech might persuade provides no lawful basis for quieting it.[5] The critical line for First Amendment free speech protection must be drawn between advocacy, which is entitled to full protection, and action, which is not.[6] Thus, even though expression is intended to exercise a coercive impact on its audience so as to impel action, it remains protected where it does not directly threaten violence.[7] Even if violence is imminent, temporary interference with the speaker's exercise of his First Amendment rights is permissible only as a last resort when police are otherwise unable to protect the safety of the public and only insofar as necessary to avoid serious harm.[8]

Further, when balanced against First Amendment rights, the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.[9] Constitutional guarantees of free speech and free press do not permit the State to forbid or proscribe advocacy of the use of force or of a violation of law except when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[10] Therefore, provided that the exercise of freedom of speech assured by the First Amendment does not incite imminent violence, it is free from governmental suppression or sanction even if the speakers advocate violation of law.[11]

CUMULATIVE SUPPLEMENT

Cases:

Christian evangelists' speech at city festival celebrating Arab culture advocating for their Christian beliefs and for harboring contempt for Islam was not barred from protection under First Amendment pursuant to doctrine of incitement, even if evangelists' speech was intended to anger their target audience, where none of evangelists' speech advocated for, encouraged, condoned, or embraced imminent violence or lawlessness, and there was no indication that they intended imminent lawlessness to ensue. U.S.C.A. Const.Amend. 1. Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

2 U.S.—National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); Hanover Tp. Federation of Teachers, Local 1954 (AFL-CIO) v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972).

Pa.—Com. v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840 (1967).

Appeals for unity and action

An advocate must be free to stimulate his or her audience with spontaneous and emotional appeals for unity and action in a common cause and, when such appeals do not incite lawless action, they must be regarded as protected speech.

U.S.—N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

3 U.S.—Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

4 U.S.—Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

N.H.—State v. Oliveira, 115 N.H. 559, 347 A.2d 165 (1975).

5 U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

6 U.S.—Hinshaw v. Smith, 436 F.3d 997 (8th Cir. 2006).

7 N.Y.—Plainview Realty, Inc. v. Board of Managers of Village on Artist Lake Condominium, 86 Misc. 2d 515, 383 N.Y.S.2d 194 (Sup 1976).

Tex.—Stansbury v. Beckstrom, 491 S.W.2d 947, 62 A.L.R.3d 222 (Tex. Civ. App. Eastland 1973).

Threat of social pressure

Reading aloud of the names of boycott violators and publishing their names in a local black newspaper in an effort to persuade others to join a boycott of white businesses through social pressure and threat of social ostracism was protected by the First Amendment; speech does not lose its protected character simply because it may embarrass others or coerce them into action.

U.S.—N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

8 U.S.—Congine v. Village of Crivitz, 947 F. Supp. 2d 963 (E.D. Wis. 2013).

9 U.S.—U.S. v. Stevens, 533 F.3d 218 (3d Cir. 2008), aff'd, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

10 U.S.—Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013).
Cal.—D.C. v. R.R., 182 Cal. App. 4th 1190, 106 Cal. Rptr. 3d 399, 254 Ed. Law Rep. 305 (2d Dist. 2010), as modified, (Apr. 8, 2010).
Conn.—State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014).

11 U.S.—Affordable Housing Development Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

3. Subjects of Free Speech and Press

§ 935. Particular subjects of free speech protection

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1493 to 1507, 1517, 1520, 1524, 1526 to 1528, 1545 to 1586, 1596, 1600 to 1605, 1609 to 1616, 1624, 1630, 1650, 1670, 1671, 1681, 1687, 1700, 1720, 1721, 1725, 1775, 1780, 1781, 1790, 1795, 1800 to 1818, 1827 to 1834, 1840, 1841, 1845, 1847, 1848, 1850 to 1854, 1860, 1866, 1868, 1885, 1889, 1894, 1897, 1901, 1926, 2035, 2037, 2039, 2040, 2041, 2050, 2085, 2086, 2088, 2091, 2097, 2098, 2100 to 2104, 2115, 2117, 2147, 2181, 2182, 2199, 2200, 2265, 2266

Speech on various topics including appeals for charity, religious speech, and information regarding legal rights is constitutionally protected.

Appeals for charitable funds are within the protection of the guaranty of freedom of speech since they involve the communication of ideas, dissemination and propagation of views, and advocacy of causes, all of which are speech interests.[1]

Religious speech is protected speech.[2] The protection includes solicitation of contributions of funds to support religion[3] and the distribution of religious literature.[4]

Speech and press activity for the purpose of informing people of their legal rights and assisting them in exercising and enforcing those rights is protected.[5] Since abortion and birth control are matters which involve constitutional rights, dissemination of information on these subjects is protected,[6] even if it takes place in a commercial setting, or for profit,[7] so that governmental interference must be justified by a significant governmental interest.[8]

Testimony of a witness is protected speech.[9]

The First Amendment does not prevent participation by the government in the marketplace of ideas,[10] and when the State exercises its freedom to speak, it may express its own viewpoint[11] and exercise editorial control over its own medium of expression,[12] or it may neutrally relay the messages of others.[13] However, the government is not compelled to speak by the First Amendment,[14] and it is not required to assist others in funding expression of particular ideas, including political ones.[15]

CUMULATIVE SUPPLEMENT

Cases:

The boundaries of the public concern test for speech that is entitled to special protection under the First Amendment are not well defined, but guiding principles articulated by the Supreme Court accord broad protection to speech to ensure that courts themselves do not become inadvertent censors. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Christian evangelists' speech at city festival celebrating Arab culture advocating for their Christian beliefs and for harboring contempt for Islam was not directed at any individual, and thus did not constitute fighting words that were excluded from protection under First Amendment. U.S.C.A. Const.Amend. 1. Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).
Colo.—May v. People, 636 P.2d 672 (Colo. 1981).
As to government restrictions of charitable solicitations, generally, see § 952; as to government restrictions on charitable solicitation imposed in the exercise of the police power, see § 964; as to appeals in public places for charitable funds, see § 990.

2 U.S.—Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).
As to freedom of religious exercise, generally, see §§ 855 et seq.
Constitutional basis
The protection afforded religious speech by First Amendment is derived from the Free Exercise Clause, the Free Speech Clause, or both.
U.S.—Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), decision aff'd, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981).

3 U.S.—Jaffe v. Alexis, 659 F.2d 1018 (9th Cir. 1981); Hall v. McNamara, 456 F. Supp. 245 (N.D. Cal. 1978); International Soc. for Krishna Consciousness of Western Pa., Inc. v. Griffin, 437 F. Supp. 666 (W.D. Pa. 1977).

4 U.S.—Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943); Hall v. McNamara, 456 F. Supp. 245 (N.D. Cal. 1978).

5 **Legal aid organization**

U.S.—International Union, United Auto., Aerospace and Agr. Implement Workers of America, and its Locals 1093, 558 and 25 v. National Right to Work Legal Defense and Ed. Foundation, Inc., 590 F.2d 1139, 26 Fed. R. Serv. 2d 582 (D.C. Cir. 1978).

Advocating lawful means for vindicating legal rights

The First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights, including advising another that his or her legal rights have been infringed

N.Y.—Vinluan v. Doyle, 60 A.D.3d 237, 873 N.Y.S.2d 72 (2d Dep't 2009), as amended, (July 21, 2009).

Litigation as political expression

Solicitation of prospective litigants by a nonprofit organization that engages in litigation as a form of political expression constitutes expressive conduct entitled to First Amendment protection as to which the government may regulate only with narrow specificity.

U.S.—In re Primus, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978).

6 U.S.—Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

Referral to physician who performs abortions

U.S.—Valley Family Planning v. State of N.D., 489 F. Supp. 238 (D.N.D. 1980), judgment aff'd, 661 F.2d 99 (8th Cir. 1981).

7 U.S.—Atlanta Co-op News Project v. U.S. Postal Service, 350 F. Supp. 234 (N.D. Ga. 1972).

8 U.S.—Associated Students for University of California at Riverside v. Attorney General of U. S., 368 F. Supp. 11 (C.D. Cal. 1973).

9 U.S.—Tate v. Yenoir, 537 F. Supp. 306 (E.D. Mich. 1982); Hoopes v. Nacrelli, 512 F. Supp. 363 (E.D. Pa. 1981).

Truthful testimony

U.S.—Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008).

10 U.S.—Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981), on reh'g, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982).

N.J.—McGlynn v. New Jersey Public Broadcasting Authority, 88 N.J. 112, 439 A.2d 54, 27 A.L.R.4th 322 (1981).

11 U.S.—Community-Service Broadcasting of Mid-America, Inc. v. F.C.C., 593 F.2d 1102 (D.C. Cir. 1978).

N.J.—McGlynn v. New Jersey Public Broadcasting Authority, 88 N.J. 112, 439 A.2d 54, 27 A.L.R.4th 322 (1981).

Viewpoint neutrality requirements inapplicable

If the government engages in its own expressive conduct, then the Free Speech Clause and its viewpoint neutrality requirements have no application.

U.S.—American Civil Liberties Union of North Carolina v. Tata, 742 F.3d 563 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3076 (U.S. July 11, 2014).

Amicus curiae brief

State attorney general's filing of an amicus curiae brief in the United States Supreme Court did not violate the First Amendment rights of expression of citizens who opposed a position taken in the brief.

Wash.—Young Americans For Freedom v. Gorton, 91 Wash. 2d 204, 588 P.2d 195 (1978).

12 U.S.—Muir v. Alabama Educational Television Com'n, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982).

Refusal of art grant to magazine

U.S.—Advocates for Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976).

Freedom to establish venue

Under the First Amendment Free Speech Clause, the government is free to establish venues for the exclusive expression of its own viewpoint.

U.S.—Oberwetter v. Hilliard, 639 F.3d 545 (D.C. Cir. 2011).

13 N.J.—McGlynn v. New Jersey Public Broadcasting Authority, 88 N.J. 112, 439 A.2d 54, 27 A.L.R.4th 322 (1981).

14 U.S.—Muir v. Alabama Educational Television Com'n, 688 F.2d 1033, 66 A.L.R. Fed. 585 (5th Cir. 1982).

15 U.S.—Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

4. Prior Restraint

§ 936. Prior restraints of speech or press, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1526 to 1528

Prior restraints of speech or press are presumed to be unconstitutional.

Prior restraint of publication or republication of a statement which is of public interest is rarely, if ever, permissible,[1] as prior restraint of constitutionally protected expression is the most serious and least tolerable of infringements on First Amendment rights.[2] While a party may be held responsible for abusing his or her right to speak freely in a subsequent tort action, he or she has the initial right to speak freely without censorship.[3] Any prior restraint by government of speech or press is heavily presumed to be unconstitutional.[4]

The rules of prior restraint apply to the states by virtue of the Fourteenth Amendment.[5]

Footnotes

1 U.S.—Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967); Robinson v. American Broadcasting Companies, 441 F.2d 1396 (6th Cir. 1971).

2 Cal.—DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 4 Cal. Rptr. 3d 69, 75 P.3d 1 (2003), as modified, (Oct. 15, 2003).
Colo.—In re Requests for Investigation of Attorney E., 78 P.3d 300 (Colo. 2003).
S.D.—Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).

3 Cal.—Evans v. Evans, 162 Cal. App. 4th 1157, 76 Cal. Rptr. 3d 859 (4th Dist. 2008).

4 U.S.—Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); U.S. v. Quattrone, 402 F.3d 304 (2d Cir. 2005).
Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).
Miss.—Mississippi Com'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004).
S.D.—Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).
Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).
Presumptively invalid
Prior restraint on speech must be considered presumptively invalid and may be justified only if the purpose that is intended to be accomplished is a compelling state interest and does so by the least restrictive means.
Fla.—Romero v. Erik G. Abrahamson, P.A., 113 So. 3d 870 (Fla. 2d DCA 2012).
Broad prophylactic rules suspect
Broad prophylactic rules in the area of free expression under the First Amendment are suspect.
Ky.—Curd v. Kentucky State Bd. of Licensure for Professional Engineers and Land Surveyors, 433 S.W.3d 291 (Ky. 2014).

5 Wash.—State ex rel. Superior Court of Snohomish County v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971) (holding modified on other grounds by, State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984)).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

4. Prior Restraint

§ 937. What constitutes prior restraint of speech or press

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1526 to 1528

A prior restraint of speech or press limits the right to speak rather than imposing a sanction after publication.

Governmental regulations that prohibit or limit the future dissemination of constitutionally protected speech constitute prior restraints.[1] The term is generally used to describe administrative and judicial orders forbidding certain communications when issued before such communications are to occur.[2] A prior restraint may take the form of a temporary restraining order or permanent injunction,[3] censorship, or a requirement for a license or permit.[4] A scheme that places unbridled discretion in the hands of government official or agency may also constitute prior restraint.[5] Whether a statute, ordinance, or administrative rule is a prior restraint depends on its nature and purpose[6] and on whether the restraint prevents expression or has only an indirect or minor effect on speech.[7]

A prior restraint imposes in advance a limit upon the right to publish or speak,[8] or prevents the expression of a message,[9] rather than merely imposing a sanction after publication or utterance.[10] A prior restraint occurs, for instance, when the State attempts to prohibit the publication of material in the possession of the media[11] or when speech is conditioned upon the prior

approval of a public official.[12] Prior restraints on speech can be unconstitutional even if subsequent redress of harm caused by the speech is not prohibited.[13]

A prior restraint seeks to suppress speech because of its content.[14] A regulation is not a prior restraint if it is merely a valid time, place, or manner restriction on the exercise of protected speech.[15]

A prior restraint of freedom of speech or of the press may appear where there is a threat of prosecution[16] or arrest of a speaker, seller, or distributor of expressive materials[17] calculated to substantially inhibit distribution or exhibition of materials not yet adjudged to be unprotected or subject to restriction. Warnings from a court with respect to the exercise of speech and informal procedures undertaken by officials and designed to chill expression can constitute prior restraints on speech.[18] However, the mere in terrorem effect of a statutory prohibition, or of an injunctive order which follows a judicial determination that the expression prohibited is not protected, does not make the prohibition or order a prior restraint.[19]

Permitting the pretrial seizure of allegedly obscene material violates the First Amendment[20] if the material is seized in such quantities that under the circumstances of the case distribution of presumptively protected matter will be largely inhibited before a final adjudication of whether the material is protected.[21] However, a seizure of a few copies of such materials for use as evidence in subsequent proceedings is not a prior restraint where interim exhibition or distribution is not prevented by the seizure.[22]

A prohibition of the recording of meetings of a public agency by mechanical means is not a prior restraint on publication where persons are free to attend the meeting and disseminate what they learn by so attending by publication or otherwise.[23]

Abatement laws which seek to close premises used for unlawful unprotected expression, or enjoin their future use for specified expressive activity, are prior restraints.[24]

CUMULATIVE SUPPLEMENT

Cases:

Permanent injunction prohibiting defendants from republishing, orally or in writing, any of six statements that they previously employed to defame scientist, constituted prior restraint on speech, and thus Court of Appeals would apply strict scrutiny to determine whether the injunction violated First Amendment; injunction was judicial order forbidding certain communications issued in advance of the time that such communications were to occur. U.S. Const. Amend. 1. Sindi v. El-Moslimany, 896 F.3d 1 (1st Cir. 2018).

Regulation that requires speaker to obtain permit before speaking is prior restraint that violates First Amendment where, due to lack of narrow, objective, and definite standards, broad or unbridled discretion is granted, effectively authorizing suppression of speech prior to its expression. U.S. Const. Amend. 1. Moore v. Brown, 868 F.3d 398 (5th Cir. 2017).

Property owner, who sought to rent out his property for use in wedding ceremonies and related events, could facially challenge county's permitting scheme, which required landowners to obtain a conditional use permit in order to host outdoor weddings on their properties, as prior restraint on expression in violation of the First Amendment; the permitting scheme lacked definite and objective standards for granting a permits, and failed to provide any limitation on the time period within which a permit had to be approved or denied, which effectively conferred unbridled discretion on permitting officials. U.S. Const. Amend. 1. Epona v. County of Ventura, 876 F.3d 1214 (9th Cir. 2017).

Nondisparagement orders are, by definition, a prior restraint on speech. U.S. Const. Amend. 1. Shak v. Shak, 484 Mass. 658, 144 N.E.3d 274 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981).
Colo.—City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995).

2 Cal.—DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 4 Cal. Rptr. 3d 69, 75 P.3d 1 (2003), as modified, (Oct. 15, 2003).
Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).
Me.—City of Bangor v. Diva's, Inc., 2003 ME 51, 830 A.2d 898 (Me. 2003).
S.D.—Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).
Warnings
U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).
Gag orders
Miss.—In re R.J.M.B., 133 So. 3d 335 (Miss. 2013).

3 Mo.—State ex rel. Wampler v. Bird, 499 S.W.2d 780 (Mo. 1973).
S.D.—Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).

4 Fla.—State v. Hanna, 901 So. 2d 201 (Fla. 5th DCA 2005).
Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).

5 U.S.—Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir. 2009).
Colo.—City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995).
Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).
Zoning ordinance
U.S.—Green Valley Inv., LLC v. County of Winnebago, 790 F. Supp. 2d 947 (E.D. Wis. 2011), as amended, (July 15, 2011).

6 U.S.—Paper Back Mart v. City of Anniston, Alabama, 407 F. Supp. 376 (N.D. Ala. 1976).

7 N.J.—Murray v. Lawson, 138 N.J. 206, 649 A.2d 1253 (1994).

8 Neb.—City of Lincoln v. ABC Books, Inc., 238 Neb. 378, 470 N.W.2d 760 (1991).
Wash.—In re Marriage of Suggs, 152 Wash. 2d 74, 93 P.3d 161 (2004), as amended on denial of reconsideration, (Nov. 2, 2004).

9 N.J.—Hamilton Amusement Center v. Verniero, 156 N.J. 254, 716 A.2d 1137 (1998).

10 U.S.—Incredible Investments, LLC v. Fernandez-Rundle, 984 F. Supp. 2d 1318 (S.D. Fla. 2013).
Alaska—State v. Haley, 687 P.2d 305 (Alaska 1984).
Okla.—In re Initiative Petition No. 341, State Question No. 627, 1990 OK 53, 796 P.2d 267 (Okla. 1990).

11 D.C.—In re J.D.C., 594 A.2d 70 (D.C. 1991).

12 Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).

13 Me.—Central Maine Power Co. v. Public Utilities Com'n, 1999 ME 119, 734 A.2d 1120 (Me. 1999).

14 Neb.—State v. Kelley, 249 Neb. 99, 541 N.W.2d 645 (1996).

15 Wash.—State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984).
As to time, place, and manner restrictions, see § 957.
Time limit for public comment
A three-minute time limit imposed by mayor during public comments portion of a city council meeting did not constitute a prior restraint in violation of a meeting attendee's First Amendment rights where the

limitation was a restriction appropriately imposed to promote orderly and efficient meetings and the attendee had ample alternative channels of communication available to him which he used.

Okla.—Shero v. City of Grove, Okl., 510 F.3d 1196 (10th Cir. 2007).

16 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).

Alaska—Hanby v. State, 479 P.2d 486 (Alaska 1970).

Self-censorship

The doctrine of prior restraint was designed to prevent self-censorship.

Okla.—In re Initiative Petition No. 341, State Question No. 627, 1990 OK 53, 796 P.2d 267 (Okla. 1990).

17 U.S.—Butts v. Monk, 516 F. Supp. 1 (S.D. Ind. 1980).

18 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).

19 U.S.—U.S. v. Treatman, 408 F. Supp. 944 (C.D. Cal. 1976).

20 U.S.—Adult Video Ass'n v. Reno, 41 F.3d 503 (9th Cir. 1994).

21 U.S.—Quantity of Copies of Books v. State of Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

22 U.S.—Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973); U.S. v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975).

23 U.S.—CBS, Inc. v. Lieberman, 439 F. Supp. 862 (N.D. Ill. 1976).

La.—Dean v. Guste, 414 So. 2d 862, 5 Ed. Law Rep. 1300 (La. Ct. App. 4th Cir. 1982), writ denied, 417 So. 2d 366 (La. 1982).

24 U.S.—Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980).

Cal.—People ex rel. Van de Kamp v. American Art Enterprises, Inc., 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (2d Dist. 1977) (disapproved of on other grounds by, People v. Freeman, 46 Cal. 3d 419, 250 Cal. Rptr. 598, 758 P.2d 1128 (1988)).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

4. Prior Restraint

§ 938. When prior restraint of speech or press permitted

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1526 to 1528

A prior restraint of speech or press is not unconstitutional per se and may be permissible under extraordinary circumstances.

Notwithstanding the extreme disfavor in which prior restraints of speech are held, the constitutional protection against them is not absolute.[1] A prior restraint is not unconstitutional per se[2] and may be valid under extraordinary circumstances.[3]

To be lawful, a prior restraint of speech or press must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.[4] Exceptions exist where the speech or activity restrained is not protected by the First Amendment;[5] where, although the speech is of a kind ordinarily protected, the agency applying the restraint is exempt from the strictures of the guaranty of freedom of speech and press;[6] where the restraint is reasonably incidental to the achievement of another valid governmental purpose;[7] and where the activity restrained poses a serious and imminent threat to some protected competing public interest,[8] or will irreparably damage a private interest.[9] Potential harm to an economic interest is not sufficient to justify a prior restraint.[10]

In order that a prior restraint of speech or press may be justified because it averts a serious or imminent threat to a legitimate public interest, it must be clearly shown that there exists an immediate danger of irreparable injury[11] or, in other words, a clear and present danger.[12] A prior restraint of speech may be justified by the capacity for, or extent of, evil involved.[13] A scheme in which a permit to exercise rights of freedom of speech and distribution of literature on certain conditions may be revoked without privilege of renewal for an extended period upon violation of the conditions inhibits presumptively protected future expression and is an invalid prior restraint without a showing that the future expression is overwhelmingly likely to be unprotected.[14]

Footnotes

1 U.S.—Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (1961); Powe v. Miles, 407 F.2d 73, 32 A.L.R.3d 846 (2d Cir. 1968).
Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).

2 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).
Neb.—State v. Kelley, 249 Neb. 99, 541 N.W.2d 645 (1996).
Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).

3 U.S.—Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).
Cal.—Wilson v. Superior Court, 13 Cal. 3d 652, 119 Cal. Rptr. 468, 532 P.2d 116 (1975).

4 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981).
Neb.—J.Q. Office Equipment of Omaha, Inc. v. Sullivan, 230 Neb. 397, 432 N.W.2d 211 (1988).

5 U.S.—Bernard v. Gulf Oil Co., 619 F.2d 459, 29 Fed. R. Serv. 2d 960 (5th Cir. 1980), judgment aff'd, 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693, 31 Fed. R. Serv. 2d 509 (1981).
Md.—Curran v. Price, 334 Md. 149, 638 A.2d 93 (1994).
Neb.—J.Q. Office Equipment of Omaha, Inc. v. Sullivan, 230 Neb. 397, 432 N.W.2d 211 (1988).
As to speech not protected by the First Amendment, see §§ 953 et seq.

6 U.S.—Rodgers v. U.S. Steel Corp., 536 F.2d 1001, 22 Fed. R. Serv. 2d 326 (3d Cir. 1976).

7 U.S.—Rodgers v. U.S. Steel Corp., 536 F.2d 1001, 22 Fed. R. Serv. 2d 326 (3d Cir. 1976).

8 U.S.—CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).
N.Y.—People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986).
Military security
Neb.—J.Q. Office Equipment of Omaha, Inc. v. Sullivan, 230 Neb. 397, 432 N.W.2d 211 (1988).

9 N.Y.—K. D. v. Educational Testing Service, 87 Misc. 2d 657, 386 N.Y.S.2d 747 (Sup 1976).

10 Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).

11 U.S.—Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967); Bernard v. Gulf Oil Co., 619 F.2d 459, 29 Fed. R. Serv. 2d 960 (5th Cir. 1980), judgment aff'd, 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693, 31 Fed. R. Serv. 2d 509 (1981).
N.Y.—East Meadow Community Concerts Ass'n v. Board of Ed. of Union Free School Dist. No. 3, Nassau County, 18 N.Y.2d 129, 272 N.Y.S.2d 341, 219 N.E.2d 172 (1966).

12 N.Y.—Corocran v. Quick, 109 Misc. 2d 996, 441 N.Y.S.2d 365 (Sup 1981).
As to the clear and present danger doctrine, generally, see § 963.

13 U.S.—Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (1961).
Gravity of evil discounted by improbability
Iowa—Des Moines Register & Tribune Co. v. Osmundson, 248 N.W.2d 493 (Iowa 1976).

14 U.S.—International Soc. for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809 (5th Cir. 1979).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

4. Prior Restraint

§ 939. Requirements of valid prior restraint of speech or press

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1505, 1506, 1526 to 1528

A prior restraint of speech or press must be narrowly drawn and closely scrutinized.

Prior restraints are carefully scrutinized by the courts when they are challenged.[1] The validity of a prior restraint depends on a balance of the interests sought to be protected by the limitation against the injury to free utterance.[2] Before a prior restraint can be deemed constitutional, the court must determine that it is justified by the magnitude of the danger the restraint seeks to prevent, discounted by its improbability.[3] A more stringent standard applies when determining whether an injunction unconstitutionally restricts a person or group's right to free speech than when analyzing whether a statute, ordinance, or regulation does so.[4]

The prior restraint must protect a compelling[5] or vital[6] governmental interest, and the government must offer compelling proof that the restraint is essential to that interest.[7] Moreover, the restraint must be precisely tailored to the needs of the case,[8] and it must be the least restrictive means available to avert the anticipated evil.[9]

Statutes, ordinances, regulations, or orders of court which amount to prior restraints must be reasonably certain and avoid overbreadth.[10] Any scheme which allows an official to impose a prior restraint must strictly define his or her discretion by adequate standards.[11]

Prior restraints which control protected speech must ordinarily be neutral with respect to its content[12] but may limit speech with respect to its time, place, or manner.[13] The rule that a person's exercise of his or her freedom of expression in appropriate places may not be abridged on the plea that it may be exercised in some other place applies to prior restraints.[14] Since false speech as well as true speech is protected by the guaranty of freedom of speech and of the press from previous restraint or censorship,[15] prior restraint is not justified even though the speech or publication is alleged to be false or scandalous.[16] Likewise, a prior restraint is not justified merely to prevent an invasion of individual privacy.[17]

A restriction which predicts the content and effect of speech in order to justify the restriction is presumptively invalid.[18] For instance, future issues of a publication may not be restrained because past issues or past publications by the same publisher have been found unprotected or subject to sanctions.[19]

Footnotes

1 Bernard v. Gulf Oil Co., 619 F.2d 459, 29 Fed. R. Serv. 2d 960 (5th Cir. 1980), judgment aff'd, 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693, 31 Fed. R. Serv. 2d 509 (1981); CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).
Level of scrutiny
The first step to analyze whether a provision is an unconstitutional prior restraint on speech is whether the challenged regulation is content-based; if the regulation is content-based, it is subject to strict scrutiny, but if it is content-neutral, it is subject to intermediate scrutiny.
U.S.—CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir. 2006).

2 U.S.—Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1967).

3 Md.—Baltimore Sun Co. v. State, 340 Md. 437, 667 A.2d 166 (1995).

4 W. Va.—Wheeling Park Com'n v. Hotel and Restaurant Employees, Intern. Union, AFL-CIO, 198 W. Va. 215, 479 S.E.2d 876 (1996).

5 U.S.—Stilp v. Contino, 613 F.3d 405 (3d Cir. 2010).
Mass.—George W. Prescott Pub. Co. v. Stoughton Div. of Dist. Court Dept. of Trial Court, 428 Mass. 309, 701 N.E.2d 307 (1998).
N.J.—R.M. v. Supreme Court, 185 N.J. 208, 883 A.2d 369 (2005).

6 U.S.—Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir. 1974).
Interest of highest order
Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).

7 U.S.—Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3d Cir. 1974).

8 U.S.—Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968); Stilp v. Contino, 613 F.3d 405 (3d Cir. 2010).
Narrowly drawn
U.S.—National Federation of the Blind of Texas, Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011).

9 Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).
Mass.—George W. Prescott Pub. Co. v. Stoughton Div. of Dist. Court Dept. of Trial Court, 428 Mass. 309, 701 N.E.2d 307 (1998).
Showing of precise nexus required
U.S.—Watters v. Otter, 986 F. Supp. 2d 1162 (D. Idaho 2013).

10 U.S.—International Soc. for Krishna Consciousness of Berkeley, Inc. v. Kearnes, 454 F. Supp. 116 (E.D. Cal. 1978); Shadid v. Jackson, 521 F. Supp. 85 (E.D. Tex. 1981).

11 U.S.—Venuti v. Riordan, 521 F. Supp. 1027 (D. Mass. 1981); Abel v. Town of Orangetown, 759 F. Supp. 161 (S.D. N.Y. 1991).

Unbridled discretion

An ordinance giving a mayor unbridled authority to approve or deny licenses was unconstitutional.

U.S.—City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

12 U.S.—Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979); Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975).

13 U.S.—Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981).

14 U.S.—International Soc. for Krishna Consciousness, Inc. v. Bowen, 456 F. Supp. 437 (S.D. Ind. 1978), judgment aff'd, 600 F.2d 667 (7th Cir. 1979) and aff'd, 601 F.2d 597 (7th Cir. 1979).

Mass.—Nyer v. Munoz-Mendoza, 385 Mass. 184, 430 N.E.2d 1214 (1982).

15 § 936.

16 U.S.—Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

17 U.S.—Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

Mass.—Nyer v. Munoz-Mendoza, 385 Mass. 184, 430 N.E.2d 1214 (1982).

18 U.S.—University of Southern Mississippi Chapter of Mississippi Civil Liberties Union v. University of Southern Miss., 452 F.2d 564 (5th Cir. 1971).

Surmise or conjecture

The First Amendment tolerates absolutely no prior restraints predicated on surmise or conjecture that untoward consequences may result.

U.S.—Bertot v. School Dist. No. 1, Albany County, Wyoming, 522 F.2d 1171 (10th Cir. 1975).

19 U.S.—Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

4. Prior Restraint

§ 940. Requirements of valid prior restraint of speech or press—Procedural safeguards

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1526 to 1528

A prior restraint must take place under adequate procedural safeguards designed to obviate the dangers of censorship in order to avoid constitutional infirmity.

To avoid constitutional infirmity, a prior restraint must take place under adequate procedural safeguards designed to obviate the dangers of censorship.[1] Thus, if a prior restraint is to be valid, either it must be preceded by notice to the persons restrained, and an opportunity for them to be heard,[2] or, where prior notice and hearing are not practicable, the persons restrained must be afforded an opportunity for a prompt final judicial determination of the propriety of the restraint[3] so that the deterrent effect of the interim and possibly erroneous restraint will be minimized.[4]

Seizures of speech or press materials which amount to prior restraints require specific safeguards: except in the case of legitimate emergencies,[5] a search warrant must be issued prior to seizure,[6] based on a sufficient showing to the issuing officer that the material to be seized is not protected;[7] the possessor of the material must have an opportunity before issuance of the warrant to contest the proposition that the matter is not protected,[8] or, following seizure, the owner of the materials must be accorded an

opportunity to secure a prompt pretrial adversary hearing on the issue whether the material is protected;[9] and a prompt, final, and full adversary trial on the issue whether the material is protected must be assured.[10]

Where a scheme of prior restraint involves prior application for permission to speak, publish, exhibit, or distribute, and granting or withholding of permission is in the discretion of an official, the restraint prior to judicial review must be imposed only for a specified brief period and only for the purpose of preserving the status quo.[11] The burden of either granting the application or instituting proceedings and of proving that the suppressed material is unprotected must generally rest on the censor,[12] and the procedure must provide for a prompt final judicial determination.[13]

Footnotes

1 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).
Md.—Pack Shack, Inc. v. Howard County, 377 Md. 55, 832 A.2d 170 (2003).
Mass.—In re Opinion of the Justices to the Senate, 436 Mass. 1201, 764 N.E.2d 343 (2002).
Duty of courts
U.S.—Green Valley Inv., LLC v. County of Winnebago, 790 F. Supp. 2d 947 (E.D. Wis. 2011), as amended, (July 15, 2011).
Judicial determination
If the First Amendment means anything at all, it requires at least that a party be given a judicial determination that a nexus between regulated speech and some evil which the State has a right to prevent exists before the State can silence him.
U.S.—Watters v. Otter, 986 F. Supp. 2d 1162 (D. Idaho 2013).

2 U.S.—ISKCON, Inc. v. Schmidt, 523 F. Supp. 1303 (D. Md. 1981).
Subsequent procedures inadequate
Issuance by a state court of an ex parte injunction which aborted a scheduled rally or public meeting of a political party, even if the restraint was of short duration, was a matter of importance and consequence in view of the First Amendment imperative, and denial of a basic procedural right was not excused by availability of postissuance procedure under state law.
U.S.—Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968).

3 U.S.—U.S. v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).
Cal.—People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976).
S.C.—Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000).
Immediate appellate review or stay of injunction
U.S.—National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977).

4 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Hall v. Board of School Com'rs of Mobile County, Ala., 681 F.2d 965, 5 Ed. Law Rep. 370, 65 A.L.R. Fed. 196 (5th Cir. 1982).

5 U.S.—Roaden v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).
Cal.—Suki, Inc. v. Superior Court, 60 Cal. App. 3d 616, 131 Cal. Rptr. 615 (4th Dist. 1976).

6 Cal.—Suki, Inc. v. Superior Court, 60 Cal. App. 3d 616, 131 Cal. Rptr. 615 (4th Dist. 1976).

7 U.S.—Quantity of Copies of Books v. State of Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

8 U.S.—Quantity of Copies of Books v. State of Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

9 Cal.—Suki, Inc. v. Superior Court, 60 Cal. App. 3d 616, 131 Cal. Rptr. 615 (4th Dist. 1976).
Hearing not denied
U.S.—U.S. v. Sherwin, 539 F.2d 1 (9th Cir. 1976).

10 Cal.—Suki, Inc. v. Superior Court, 60 Cal. App. 3d 616, 131 Cal. Rptr. 615 (4th Dist. 1976).

11 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

Ark.—Orrell v. City of Hot Springs, 311 Ark. 301, 844 S.W.2d 310 (1992).
S.C.—Harkins v. Greenville County, 340 S.C. 606, 533 S.E.2d 886 (2000).

12 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).
Ark.—Orrell v. City of Hot Springs, 311 Ark. 301, 844 S.W.2d 310 (1992).

13 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Illinois Ass'n of Realtors v. Village of Bellwood, 516 F. Supp. 1067 (N.D. Ill. 1981).
Ark.—Orrell v. City of Hot Springs, 311 Ark. 301, 844 S.W.2d 310 (1992).
La.—State v. Franzone, 384 So. 2d 409 (La. 1980).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

a. In General

§ 941. Commercial speech, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541, 1600

A.L.R. Library

Protection of Commercial Speech Under First Amendment—Supreme Court Cases, 164 A.L.R. Fed. 1

Commercial speech is protected by the guaranties of freedom of speech and of the press, but the extent of the protection is somewhat less than that accorded noncommercial speech.

Commercial speech is speech that does no more than propose a commercial transaction[1] which is related solely to the economic interests of the speaker and his or her audience[2] or which is likely to influence consumers in their commercial decisions.[3]

It usually involves advertising products for sale[4] but is not restricted to advertising;[5] for instance, communication directed solely to the collection of a debt is purely commercial.[6] Speech is not rendered commercial by the mere fact that it relates to advertisement,[7] that the speaker is a corporation,[8] or that it criticizes a product.[9]

The State may not completely suppress the dissemination of truthful information about lawful activity[10] and constitutional guaranties of freedom of speech and of the press protect commercial speech[11] against unwarranted governmental regulation.[12] Not only do individual consumers have an interest in free access to commercial information[13] but society as a whole also has an interest in the free flow of commercial information[14] because the efficient allocation of resources depends on informed consumer choices[15] and even an individual advertisement which is wholly commercial may be of general public interest.[16] However, because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of information such speech provides, an advertiser's constitutionally protected interest in not providing any particular factual information in his or her advertising is minimal.[17]

Commercial speech is not protected to the same extent as noncommercial speech,[18] and not all regulation of commercial speech is unconstitutional[19] because commercial speech has a great potential to mislead and because the State has an interest in protecting the public from those seeking to obtain the public's money.[20] Thus, commercial speech may be subjected to a degree of regulation which would violate the guaranty of freedom of speech and press if applied to noncommercial speech.[21] The mere presence of noncommercial information in an otherwise commercial presentation does not transform the communication into fully protected speech.[22] Thus, advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech under the First Amendment.[23]

The doctrine of overbreadth is not generally applicable in cases involving commercial speech[24] unless the challenged regulation potentially inhibits noncommercial as well as commercial speech.[25] This is because commercial expression is not easily deterred by overbroad regulation and is considered more hardy, less likely to be chilled, and not in need of surrogate litigators.[26]

Restrictions on commercial speech are reviewed under the standard of intermediate scrutiny.[27] The more deferential degree of judicial scrutiny, under the First Amendment, of regulation of commercial speech is justified because commercial speech occurs in an area traditionally subject to government regulation.[28]

CUMULATIVE SUPPLEMENT

Cases:

Even under lower level of scrutiny applicable to laws requiring professionals to disclose factual, noncontroversial information in their commercial speech, a disclosure requirement cannot be unjustified or unduly burdensome, and the disclosure must remedy a harm that is potentially real not purely hypothetical, and extend no broader than reasonably necessary. U.S.C.A. Const.Amend. 1. National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

Advertiser's rights are adequately protected under First Amendment as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. U.S. Const. Amend. 1. Chong Yim v. City of Seattle, 451 P.3d 675 (Wash. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Harris v. Quinn, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).
Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).
Md.—Nefedro v. Montgomery County, 414 Md. 585, 996 A.2d 850 (2010).
Tex.—Whisenhunt v. Lippincott, 416 S.W.3d 689 (Tex. App. Texarkana 2013).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).
Advertising of prices
U.S.—Spirit Airlines, Inc. v. U.S. Dept. of Transp., 687 F.3d 403 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1723, 185 L. Ed. 2d 785 (2013).

2 U.S.—Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); Association of Private Sector Colleges and Universities v. Duncan, 681 F.3d 427, 280 Ed. Law Rep. 549 (D.C. Cir. 2012).
Tenn.—BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506 (Tenn. 2002).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).
Newspaper
A newspaper which contained news, advertisements, and various other types of information was noncommercial speech.
Wyo.—Miller v. City of Laramie, 880 P.2d 594 (Wyo. 1994).

3 Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).

4 Miss.—Mississippi Com'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004).
Promoting brand awareness or loyalty
An advertisement is no less commercial, for First Amendment purposes, because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service.
U.S.—Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).

5 Fla.—Harris v. Beneficial Finance Co. of Jacksonville, 338 So. 2d 196 (Fla. 1976).

6 Fla.—Harris v. Beneficial Finance Co. of Jacksonville, 338 So. 2d 196 (Fla. 1976).

7 U.S.—Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973); New England Accessories Trade Ass'n, Inc. v. City of Nashua, 679 F.2d 1 (1st Cir. 1982).

8 Me.—Central Maine Power Co. v. Public Utilities Com'n, 1999 ME 119, 734 A.2d 1120 (Me. 1999).

9 Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).
Neb.—J.Q. Office Equipment of Omaha, Inc. v. Sullivan, 230 Neb. 397, 432 N.W.2d 211 (1988).

10 Ill.—Ardt v. Illinois Dept. of Professional Regulation, 154 Ill. 2d 138, 180 Ill. Dec. 713, 607 N.E.2d 1226 (1992).
Advertising
U.S.—Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509 (6th Cir. 2012), cert. denied, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013).
S.C.—In re Anonymous Member of South Carolina Bar, 385 S.C. 263, 684 S.E.2d 560 (2009).
False speech
Only false, deceptive, or misleading commercial speech may be banned.
U.S.—Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

11 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).
Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).

Miss.—PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).

Mont.—Montana Media, Inc. v. Flathead County, 2003 MT 23, 314 Mont. 121, 63 P.3d 1129 (2003).

Intermediate protection under First Amendment

Me.—Central Maine Power Co. v. Public Utilities Com'n, 1999 ME 119, 734 A.2d 1120 (Me. 1999).

12 Ala.—Ex parte Walter, 829 So. 2d 186 (Ala. 2002).

Md.—Jakanna Woodworks, Inc. v. Montgomery County, 344 Md. 584, 689 A.2d 65 (1997).

Mich.—City of Rochester Hills v. Schultz, 459 Mich. 486, 592 N.W.2d 69 (1999).

13 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

14 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

Md.—Jakanna Woodworks, Inc. v. Montgomery County, 344 Md. 584, 689 A.2d 65 (1997).

Protection based on informational function of advertising

U.S.—Spirit Airlines, Inc. v. U.S. Dept. of Transp., 687 F.3d 403 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1723, 185 L. Ed. 2d 785 (2013); RTM Media, L.L.C. v. City of Houston, 578 F. Supp. 2d 875 (S.D. Tex. 2008), aff'd, 584 F.3d 220 (5th Cir. 2009).

Cal.—People ex rel. Brown v. PuriTec, 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (3d Dist. 2007), as modified, (Aug. 15, 2007).

15 U.S.—Friedman v. Rogers, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979).

Ohio—Queensgate Inv. Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 23 Ohio Op. 3d 337, 433 N.E.2d 138 (1982).

16 U.S.—Texas Optometric Ass'n, Inc. v. Rogers, 441 U.S. 917, 99 S. Ct. 2018, 60 L. Ed. 2d 389 (1979); Friedman v. Rogers, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979).

Full protection

Speech involving purely factual material of public interest is fully protected by the Free Speech Clause even if the subject of the speech is commercial matter.

Me.—Central Maine Power Co. v. Public Utilities Com'n, 1999 ME 119, 734 A.2d 1120 (Me. 1999).

17 U.S.—American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18 (D.C. Cir. 2014).

18 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993); Kiser v. Reitz, 765 F.3d 601 (6th Cir. 2014).

Iowa—Immaculate Conception Corp. v. Iowa Dept. of Transp., 656 N.W.2d 513, 173 Ed. Law Rep. 997 (Iowa 2003).

Tex.—Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

Less central to interests of First Amendment

Commercial speech is understood as less central to the interests of the First Amendment than other forms of speech.

U.S.—Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010).

19 U.S.—Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002).

20 U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

21 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

Ala.—Ex parte Walter, 829 So. 2d 186 (Ala. 2002).

Ill.—People v. Jones, 188 Ill. 2d 352, 242 Ill. Dec. 267, 721 N.E.2d 546 (1999).

22 U.S.—IMS Health Inc. v. Sorrell, 630 F.3d 263 (2d Cir. 2010), aff'd, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

23 U.S.—Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).

24 U.S.—Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); U.S. v. Wenger, 292 F. Supp. 2d 1296 (D. Utah 2003), aff'd, 427 F.3d 840, 68 Fed. R. Evid. Serv. 805 (10th Cir. 2005).

Cal.—People ex rel. Brown v. PuriTec, 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (3d Dist. 2007), as modified, (Aug. 15, 2007).

Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).

Nev.—Ford v. State, 262 P.3d 1123, 127 Nev. Adv. Op. No. 55 (Nev. 2011).

As to the overbreadth doctrine, generally, see § 962.

25 Minn.—State by Spannaus v. Century Camera, Inc., 309 N.W.2d 735, 23 A.L.R.4th 171 (Minn. 1981).

26 Cal.—People ex rel. Brown v. PuriTec, 153 Cal. App. 4th 1524, 64 Cal. Rptr. 3d 270 (3d Dist. 2007), as modified, (Aug. 15, 2007).

Ill.—Desnick v. Department of Professional Regulation, 171 Ill. 2d 510, 216 Ill. Dec. 789, 665 N.E.2d 1346 (1996).

27 U.S.—Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015); McKinley v. Abbott, 643 F.3d 403 (5th Cir. 2011); Coyote Pub., Inc. v. Miller, 598 F.3d 592 (9th Cir. 2010).

28 U.S.—Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

a. In General

§ 942. Content-based regulation of commercial speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1517, 1535 to 1541, 1600

Commercial speech maybe regulated with respect to its content.

Unlike speech generally, commercial speech may be regulated with respect to its content[1] because of the greater potential for deception or confusion in the context of certain advertising messages,[2] the increased verifiability of commercial speech,[3] and the greater objectivity and hardiness of commercial speech.[4]

Ordinarily, government may regulate, or ban entirely, commercial speech that relates to unlawful activities,[5] that is defamatory,[6] or that creates a clear risk of substantial harm to the public.[7] However, any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the First Amendment.[8]

A state may not restrict advertising of activities in another state which are not unlawful in the other state even though they would be unlawful in the state attempting to restrict the advertising.[9]

Footnotes

1 Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).
La.—DeSalvo v. State, 624 So. 2d 897 (La. 1993).
Neb.—J.Q. Office Equipment of Omaha, Inc. v. Sullivan, 230 Neb. 397, 432 N.W.2d 211 (1988).
Justification required
U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); U.S. v. Caronia, 703 F.3d 149 (2d Cir. 2012).

2 La.—DeSalvo v. State, 624 So. 2d 897 (La. 1993).

3 U.S.—Friedman v. Rogers, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979).
N.J.—On Petition for Review of Opinion 475 of Advisory Committee on Professional Ethics, 89 N.J. 74, 444 A.2d 1092, 33 A.L.R.4th 381 (1982).

4 U.S.—Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).
La.—DeSalvo v. State, 624 So. 2d 897 (La. 1993).

5 U.S.—44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).
Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).
Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).
Miss.—PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).
Legality requirement as to content
The legality requirement under the test for evaluating restrictions on commercial speech requires a court to evaluate the content of a commercial message rather than the means by which that message is conveyed.
U.S.—Valle Del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013).

6 Me.—Cumberland Farms, Inc. v. Everett, 600 A.2d 398 (Me. 1991).

7 **"Gun for hire" advertisement**
U.S.—Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992).

8 U.S.—Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008), as amended, (May 2, 2008).
Truthful, nonmisleading advertisements
Government may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles; that the government finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.
U.S.—Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509 (6th Cir. 2012), cert. denied, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013).

9 U.S.—High Ol' Times, Inc. v. Busbee, 456 F. Supp. 1035 (N.D. Ga. 1978), judgment aff'd, 621 F.2d 141 (5th Cir. 1980).
Reason for rule
If one state may ban advertisement of services or activities that are legal in a sister state but not necessarily permissible in the regulating state, other states might do the same and might exert power over a wide variety of national publications or interstate newspapers carrying similar activities or containing articles on general subject matter to which the offending advertisement referred; the burden thereby imposed on publications would impair, perhaps severely, their proper functioning.
U.S.—Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

a. In General

§ 943. Content-based regulation of commercial speech—False, deceptive, or misleading speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1517, 1539, 1600

A government may regulate or prohibit commercial speech that is false, deceptive, or misleading.

A government may regulate or prohibit commercial speech which is false, deceptive, or actually or inherently misleading,[1] and may prescribe criminal sanctions[2] or civil penalties for such advertising,[3] and a court may enter appropriate orders for corrective advertising or restraining future claims.[4] A government may not, however, prohibit absolutely certain types of potentially misleading advertising if the information may be presented in a way that is not misleading,[5] such as through adding a disclosure requirement.[6] A commercial speaker's constitutionally protected interest in not providing any particular factual information in his or her advertising is minimal,[7] and where an advertiser is required to disclose purely factual and uncontroversial information, the advertiser's free speech rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.[8]

The burden of proof as to whether the regulated speech is misleading is on the party challenging the regulation.[9]

Prior restraint of false or misleading commercial speech may be imposed without violation of the guaranties of freedom of speech and press even though false or misleading noncommercial speech might not be comparably restrained.[10] However, where commercial speech is restrained by an order to cease and desist or an injunctive order on the theory that it is false or misleading, if there is no judicial determination of falsity before the order is made, there must be an opportunity provided for prompt determination of the matter after the issuance of the order.[11]

CUMULATIVE SUPPLEMENT

Cases:

Use of name Tire Engineers for automotive service centers that provided, among other services, tire repair, maintenance, and replacement, was not inherently misleading, as would deprive the commercial expression from First Amendment protection, even though the name did not meet standards required by Mississippi regulations that restricted the use of term engineer for those not engaged in the engineering profession; essential character of Tire Engineers name was not deceptive, as it referred to work of mechanics using their skills not usually considered to fall within scope of engineering to solve technical problems related to selecting, rotating, balancing, and aligning tires. U.S. Const. Amend. 1; Miss. Code. Ann. § 73-1-1 et seq. Express Oil Change, L.L.C. v. Mississippi Board of Licensure for Professional Engineers & Surveyors, 916 F.3d 483 (5th Cir. 2019).

Because the rationale supporting First Amendment protection of commercial speech is the informational function of advertising, the government may ban forms of communication more likely to deceive the public than to inform it. U.S. Const. Amend. 1. Nicopure Labs, LLC v. Food & Drug Administration, 944 F.3d 267 (D.C. Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999); Rocket Learning, Inc. v. Rivera-Sanchez, 715 F.3d 1 (1st Cir. 2013); Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509 (6th Cir. 2012), cert. denied, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013); Spirit Airlines, Inc. v. U.S. Dept. of Transp., 687 F.3d 403 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1723, 185 L. Ed. 2d 785 (2013).
Cal.—Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002), as modified, (May 22, 2002).
Me.—State v. Dhuy, 2003 ME 75, 825 A.2d 336 (Me. 2003).
Miss.—PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).
Tex.—Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).
Protection inversely proportional to deceptiveness
Restrictions on speech receive protection under the First Amendment inversely proportional to the deceptiveness of the target advertisement.
U.S.—Dwyer v. Cappell, 762 F.3d 275 (3d Cir. 2014).
Prior restraints
Laws aimed at prohibiting deceptive commercial speech are unlikely to implicate the First Amendment's prohibition on prior restraints.
U.S.—Gibson v. Texas Dept. of Ins.—Div. of Workers' Compensation, 700 F.3d 227 (5th Cir. 2012).

2 U.S.—Ve-Ri-Tas, Inc. v. Advertising Review Council of Metropolitan Denver, Inc., 411 F. Supp. 1012 (D. Colo. 1976), judgment aff'd, 567 F.2d 963 (10th Cir. 1977).

3 Cal.—People v. Superior Court (Olson), 96 Cal. App. 3d 181, 157 Cal. Rptr. 628 (4th Dist. 1979).

4 U.S.—Litton Industries, Inc. v. F.T.C., 676 F.2d 364 (9th Cir. 1982); Warner-Lambert Co. v. F.T.C., 562 F.2d 749, 46 A.L.R. Fed. 873 (D.C. Cir. 1977).

5 U.S.—In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

6 U.S.—Dwyer v. Cappell, 762 F.3d 275 (3d Cir. 2014).

7 U.S.—Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509 (6th Cir. 2012), cert. denied, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013).

8 U.S.—Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 721 F.3d 264, 85 Fed. R. Serv. 3d 1400 (4th Cir. 2013); 1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014).

Mass.—Bulldog Investors General Partnership v. Secretary of Com., 460 Mass. 647, 953 N.E.2d 691 (2011).

9 Md.—Jakanna Woodworks, Inc. v. Montgomery County, 344 Md. 584, 689 A.2d 65 (1997).

10 U.S.—U. S. v. Reader's Digest Ass'n, Inc., 464 F. Supp. 1037 (D. Del. 1978).

Cal.—People v. Superior Court (Olson), 96 Cal. App. 3d 181, 157 Cal. Rptr. 628 (4th Dist. 1979).

As to prior restraints on speech, generally, see §§ 936 et seq.

Test of license requirement

The correct test to apply to statutes that require licensure before engaging in commercial speech is a test governing the constitutionality of limits on commercial speech.

Md.—Jakanna Woodworks, Inc. v. Montgomery County, 344 Md. 584, 689 A.2d 65 (1997).

This test is discussed in § 944.

11 U.S.—U. S. Postal Service v. Athena Products, Ltd., 654 F.2d 362 (5th Cir. 1981).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

a. In General

§ 944. Requirements for valid restrictions of commercial speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1512, 1517, 1535 to 1541, 1600

Commercial speech may be regulated if the asserted governmental interest is substantial, the regulation directly advances that interest, and the regulation is not more extensive than is necessary to serve that interest.

Commercial speech that neither concerns unlawful activity nor is misleading may be regulated if the asserted governmental interest is substantial, the regulation directly advances that interest, and the regulation is not more extensive than is necessary to serve that interest.[1]

A single substantial interest is sufficient to satisfy the first prong of the test.[2] Substantial government interests, for purposes of this test, have been held to include protection of consumers from misleading, deceptive, or aggressive sales practices,[3] ensuring the accuracy of commercial information,[4] aesthetic appearance or improvement,[5] maintaining professional independence and preventing conflicts of interest,[6] preventing invasions of privacy,[7] and traffic safety.[8] A court reviewing a regulation of commercial speech may not supplant the precise interests put forward by the State with other suppositions.[9]

The requirement that the regulation be narrowly drawn forecloses a restriction of speech which poses no danger to the asserted interest of government, and the regulation may not completely suppress information when narrower restrictions would serve that interest as well.[10] The federal government, a state, or a subdivision of a state may reasonably restrict the time, place, or manner of commercial speech[11] by regulations which forward a significant government interest where the restrictions are imposed without reference to content[12] and leave open sufficient alternative channels for communication of commercial information.[13] However, a regulation that seeks out speech providing truthful information about lawful activity and seeks to prevent its dissemination completely is void.[14]

Government restrictions upon commercial speech need not be the least restrictive means to achieve the desired end.[15] Such restrictions require only a reasonable fit between the government's ends and the means chosen to accomplish those ends.[16] The scope of the restriction must be in proportion to the interest served.[17] In determining whether a restriction on commercial speech is no more extensive than necessary, the existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is relevant in reviewing the reasonability of the means chosen.[18]

The party seeking to uphold a restriction on commercial speech carries the burden of justifying the restriction.[19] In determining whether a restriction on commercial speech directly and materially serves the government's asserted interest, the burden is not satisfied by mere speculation and conjecture[20] or where the restriction provides only ineffective or remote support for the government's purpose.[21] Rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.[22]

CUMULATIVE SUPPLEMENT

Cases:

The State has the burden to prove that law requiring professionals to disclose factual, noncontroversial information in their commercial speech is neither unjustified nor unduly burdensome. U.S.C.A. Const.Amend. 1. National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

A restriction of commercial speech must serve a substantial interest, and it must be narrowly drawn, and this means, among other things, that the regulatory technique may extend only as far as the interest it serves. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1. Matal v. Tam, 137 S. Ct. 1744 (2017).

The relationship test used to determine if a regulation is an unconstitutional restriction on commercial speech is an analytical tool that in some circumstances indicates that a speech restriction is unconstitutional because it casts doubt on whether a regulation is part of a substantial effort to advance a valid state interest. U.S. Const. Amend. 1. Vugo, Inc. v. City of New York, 931 F.3d 42 (2d Cir. 2019).

Central Hudson does not require that restriction on commercial speech redress harm completely; government may choose to regulate only part of speech that causes harm. U.S. Const. Amend. 1. Greater Philadelphia Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020).

The fourth step of *Central Hudson* analysis for restrictions on commercial speech, whether regulation is not more extensive than is necessary to serve governmental interest asserted, does not require that the regulation be the least-restrictive means to accomplish the government's goal; rather, what is required is a reasonable fit between the ends and the means, a fit that employs

not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective. U.S. Const. Amend. 1. Contest Promotions, LLC v. City and County of San Francisco, 867 F.3d 1171 (9th Cir. 2017).

The constitutionality of regulations on commercial speech is assessed under the four-part *Central Hudson* test, which asks, first, whether the challenged law regulates speech that is neither misleading nor related to unlawful activity, second, whether the government has a substantial interest at stake, third, whether the law directly advances the government's interest, and, fourth, whether a more limited restriction would be insufficient for that interest to be served as well; if a law can go four for four, it passes constitutional muster, and, if not, the challenged law unconstitutionally hampers speech. U.S.C.A. Const.Amend. 1. Dana's R.R. Supply v. Attorney General, Florida, 807 F.3d 1235 (11th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002); 1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014).
Ill.—Vuagniaux v. Department of Professional Regulation, 208 Ill. 2d 173, 280 Ill. Dec. 635, 802 N.E.2d 1156 (2003).
Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).
Tex.—Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

2 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).
Fla.—State v. Bradford, 787 So. 2d 811 (Fla. 2001).

3 S.C.—Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000).

4 U.S.—Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

5 U.S.—Naser Jewelers, Inc. v. City Of Concord, N.H., 513 F.3d 27 (1st Cir. 2008); Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010); Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007).
Ala.—Ex parte Walter, 829 So. 2d 186 (Ala. 2002).
N.Y.—OTR Media Group, Inc. v. City of New York, 83 A.D.3d 451, 920 N.Y.S.2d 337 (1st Dep't 2011).

6 U.S.—Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

7 U.S.—Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).
Ill.—Desnick v. Department of Professional Regulation, 171 Ill. 2d 510, 216 Ill. Dec. 789, 665 N.E.2d 1346 (1996).

8 U.S.—Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010); Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013).
Ky.—Flying J Travel Plaza v. Com., Transp. Cabinet, Dept. of Highways, 928 S.W.2d 344 (Ky. 1996).
N.Y.—OTR Media Group, Inc. v. City of New York, 83 A.D.3d 451, 920 N.Y.S.2d 337 (1st Dep't 2011).

9 Fla.—State v. Bradford, 787 So. 2d 811 (Fla. 2001).
N.J.—Hamilton Amusement Center v. Verniero, 156 N.J. 254, 716 A.2d 1137 (1998).

10 U.S.—In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982); Litton Industries, Inc. v. F.T.C., 676 F.2d 364 (9th Cir. 1982).
N.H.—Opinion of the Justices, 121 N.H. 542, 431 A.2d 152 (1981).

11 Ky.—Flying J Travel Plaza v. Com., Transp. Cabinet, Dept. of Highways, 928 S.W.2d 344 (Ky. 1996).

12 N.J.—State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 733 A.2d 1159 (1999).

13 U.S.—Friedman v. Rogers, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979).
Conn.—Friedson v. Town of Westport, 181 Conn. 230, 435 A.2d 17 (1980).
Haw.—State v. Bloss, 64 Haw. 148, 637 P.2d 1117 (1981).

14 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

15 U.S.—Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999); King v. Governor of the State of New Jersey, 767 F.3d 216, 89 Fed. R. Serv. 3d 1260 (3d Cir. 2014); Passions Video, Inc. v. Nixon, 458 F.3d 837, 23 A.L.R.6th 921 (8th Cir. 2006).
N.J.—Hamilton Amusement Center v. Verniero, 156 N.J. 254, 716 A.2d 1137 (1998).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

16 U.S.—Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388, 54 Ed. Law Rep. 61 (1989).
Cal.—Gerawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1, 14 Cal. Rptr. 3d 14, 90 P.3d 1179 (2004).
Reasonable fit not established
U.S.—City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).
Restrictions may be no broader than necessary
Restrictions upon potentially deceptive speech may be no broader than reasonably necessary to prevent the deception.
U.S.—Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010).
Laws need only be tailored in reasonable manner
Laws restricting commercial speech need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.
U.S.—Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010).

17 U.S.—Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999).
Cal.—Gerawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1, 14 Cal. Rptr. 3d 14, 90 P.3d 1179 (2004).
Ill.—Desnick v. Department of Professional Regulation, 171 Ill. 2d 510, 216 Ill. Dec. 789, 665 N.E.2d 1346 (1996).

18 U.S.—Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009).
Fla.—State v. Bradford, 787 So. 2d 811 (Fla. 2001).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

19 U.S.—Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002).
Ark.—Culpepper v. Arkansas Bd. of Chiropractic Examiners, 343 Ark. 467, 36 S.W.3d 335 (2001).
Mont.—Montana Media, Inc. v. Flathead County, 2003 MT 23, 314 Mont. 121, 63 P.3d 1129 (2003).

20 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).
Cal.—Gerawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1, 14 Cal. Rptr. 3d 14, 90 P.3d 1179 (2004).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).
Reviewing court limited to consideration of reasons proffered by the state
U.S.—Gibson v. Texas Dept. of Ins.—Div. of Workers' Compensation, 700 F.3d 227 (5th Cir. 2012).

21 U.S.—44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).
Ala.—Ex parte Walter, 829 So. 2d 186 (Ala. 2002).
Mich.—City of Rochester Hills v. Schultz, 459 Mich. 486, 592 N.W.2d 69 (1999).

22 U.S.—Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999).
Cal.—Gerawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1, 14 Cal. Rptr. 3d 14, 90 P.3d 1179 (2004).
Tex.—Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

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16B C.J.S. Constitutional Law § 945

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

b. Regulated Businesses and Professions

§ 945. Regulated commercial speech of businesses and professions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541, 1600 to 1602, 1604 to 1611, 1613 to 1615

General principles with respect to commercial speech and its regulation apply with respect to regulated professions, occupations, and businesses although their application may be affected by the demands of the public interest in regulation of a particular field.

The constitutional right to speak, write, or print freely may be curtailed in the regulation of certain professions.[1] Where a trade, business, or occupation is so affected with a public interest that detailed regulation of it is justified, related commercial speech may be regulated to the extent reasonably necessary to serve the government's interest in regulation of the business or the profession[2] and may be regulated or prohibited where it is misleading.[3] However, a restriction of advertising is invalid if it does not advance some legitimate public interest.[4] A blanket prohibition of advertising is invalid.[5] Advertising by public utilities may be regulated,[6] but the regulation must be proportional to the governmental interest to be served.[7]

"Head shop" laws designed to restrict establishments which sell paraphernalia for use with unlawful drugs have been upheld in some cases where it was contended that they unconstitutionally abridged freedom of commercial speech[8] under the general rule that speech which proposes illegal conduct is not protected.[9] In other cases, however, such laws have been considered invalid.[10]

CUMULATIVE SUPPLEMENT

Cases:

Even if California law requiring unlicensed clinics that performed pregnancy-related services to notify women that California had not licensed them to provide medical services was subject to deferential review applicable to laws requiring professionals to disclose factual, noncontroversial information in their commercial speech, the law unduly burdened the clinics' protected speech; law required covered facilities to post California's precise notice in English and as many other languages as California chose to require, no matter what the facilities said on site or in their advertisements, it covered a curiously narrow subset of speakers, and it targeted speakers, not speech. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Health & Safety Code §§ 123471(b)(1), 123472(b). National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743 (5th Cir. 2008); King v. Christie, 981 F. Supp. 2d 296, 86 Fed. R. Serv. 3d 1581 (D.N.J. 2013).
Or.—In re Fadeley, 310 Or. 548, 802 P.2d 31 (1990).
Power not unlimited
A state does not have unlimited power to directly restrict speech through the regulation of a profession; instead, to the extent that specific provisions of a regulatory scheme directly restrict speech, those provisions must survive either strict scrutiny or intermediate scrutiny standard.
Mo.—Kansas City Premier Apartments, Inc. v. Missouri Real Estate Com'n, 344 S.W.3d 160 (Mo. 2011).

2 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).
Investment adviser
U.S.—S. E. C. v. C. R. Richmond & Co., 565 F.2d 1101 (9th Cir. 1977).
Incidental burdens
A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.
U.S.—Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014); Waugh v. Nevada State Bd. of Cosmetology, 36 F. Supp. 3d 991 (D. Nev. 2014).
Relevant inquiry
(1) The relevant inquiry to determine whether to apply the First Amendment professional speech doctrine is whether a speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary; professional speech analysis applies in the former context, that is, where a speaker takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances.
U.S.—Moore-King v. County of Chesterfield, Va., 708 F.3d 560 (4th Cir. 2013).

3 **Certified public accountant**
Fla.—Department of Professional Regulation, Bd. of Accountancy v. Rampell, 621 So. 2d 426 (Fla. 1993).
Family counselor

A regulation which appeared to be violated by plaintiff's advertisement, which used the word "Center" although plaintiff was the lone counselor in his place of business, constituted a reasonable restraint and regulation of a recognized profession and did not deny plaintiff, a licensed marriage and family counselor, free speech.

Utah—Magleby v. State, By and Through Dept. of Business Regulations and Dept. of Registration, 564 P.2d 1109 (Utah 1977).

4 U.S.—Bolton v. Kansas State Bd. of Healing Arts, 473 F. Supp. 728 (D. Kan. 1979).

Mass.—Matter of Amendment to S.J.C. Rule 3:07, 398 Mass. 73, 495 N.E.2d 282 (1986).

5 Tenn.—Horner-Rausch Optical Co. v. Ashley, 547 S.W.2d 577 (Tenn. Ct. App. 1976).

Prohibition of advertising prices of eyeglasses

U.S.—Louisiana Consumer's League, Inc. v. Louisiana State Bd. of Optometry Examiners, 557 F.2d 473 (5th Cir. 1977).

6 U.S.—Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

Costs and expenses

Rules precluding electric and gas utilities from including certain advertising and other costs in their operating expenses did not violate the utilities' First Amendment rights where the rules did not prohibit advertising but merely determined who would pay for it.

N.H.—Appeal of Concord Natural Gas Corp., 121 N.H. 685, 433 A.2d 1291 (1981).

7 U.S.—Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

8 U.S.—New England Accessories Trade Ass'n, Inc. v. City of Nashua, 679 F.2d 1 (1st Cir. 1982); Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

Overbreadth doctrine inapplicable

U.S.—Tobacco Accessories and Novelty Craftsmen Merchants Ass'n of Louisiana v. Treen, 681 F.2d 378 (5th Cir. 1982).

Restricting display

Kan.—Cardarella v. City of Overland Park, 228 Kan. 698, 620 P.2d 1122 (1980).

9 Discussed in § 942.

10 U.S.—Record Museum v. Lawrence Tp., 481 F. Supp. 768, 5 Fed. R. Evid. Serv. 973 (D.N.J. 1979).

N.H.—Opinion of the Justices, 121 N.H. 542, 431 A.2d 152 (1981).

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16B C.J.S. Constitutional Law § 946

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

b. Regulated Businesses and Professions

§ 946. Regulated commercial speech of medical practitioners

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541, 1600 to 1602, 1614

Members of the medical profession may be regulated with respect to commercial speech and advertising, but truthful advertising concerning the availability of routine services may not be prohibited.

The State has a substantial interest in regulating the medical profession and may restrict commercial speech by members of the medical professions[1] by prohibiting misleading advertising by them.[2] Practice under a trade name may be prohibited.[3] However, truthful advertising concerning the availability of routine services may not be prohibited.[4] A blanket prohibition of advertising is invalid,[5] as is a restriction as to the time, place, or manner of such advertising, where the state interest in the restraint is outweighed by the public interest in being informed,[6] where the restraint is not shown to further the governmental interest,[7] or where the governmental interest could be upheld by less restrictive means.[8]

A lesser degree of scrutiny than strict scrutiny applies to compelled disclosures in the context of the regulation of licensed physicians, and commercial speech, in analyzing a First Amendment challenge.[9]

While the State cannot compel an individual simply to speak the state's ideological message, it can use its regulatory authority to require a physician to provide truthful, nonmisleading information relevant to a patient's decision to have an abortion even if that information might also encourage the patient to choose childbirth over abortion.[10]

CUMULATIVE SUPPLEMENT

Cases:

California law requiring licensed clinics that offered pregnancy-related services to provide a government-drafted script about the availability of state-sponsored services, including abortion, as well as contact information for how to obtain them, was a content-based regulation of speech; by compelling clinics to inform women how they could obtain state-subsidized abortions, the very practice that the clinics were devoted to opposing, the law altered the content of their speech. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Health & Safety Code § 123472(a). National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

California law requiring licensed pregnancy-related clinics to disseminate notice stating existence of publicly-funded family-planning services, including contraception and abortions, did not regulate commercial speech for First Amendment purposes; the law primarily regulated speech that occurred within the clinics. U.S. Const. Amend. 1; Cal. Health & Safety Code § 123472(a). National Institute of Family and Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016).

Record-keeping provision of Florida's Firearm Owners' Privacy Act, which prohibited physicians from intentionally entering any disclosed information concerning firearm ownership into the patient's medical record under certain circumstances, regulated speech, and thus was subject to First Amendment scrutiny; provision targeted activity, i.e., making an entry in a medical record, that was intended to convey a particular message, i.e., information about firearm ownership. U.S.C.A. Const.Amend. 1; West's F.S.A. § 790.338(1). Wollschlaeger v. Governor of the State of Florida, 814 F.3d 1159 (11th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Ill.—Desnick v. Department of Professional Regulation, 171 Ill. 2d 510, 216 Ill. Dec. 789, 665 N.E.2d 1346 (1996).
Doctrine of overbreadth inapplicable
U.S.—Davis v. Board of Medical Examiners, 497 F. Supp. 525 (D.N.J. 1980).
Regulation must pass requisite constitutional test
Though physicians and other professionals may be subject to regulations by the state that restrict their First Amendment freedoms when acting in the course of their professions, professionals do not leave their speech rights at the office door; any state regulation that limits the free speech rights of professionals must pass the requisite constitutional test.
U.S.—Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015).

2 U.S.—Bolton v. Kansas State Bd. of Healing Arts, 473 F. Supp. 728 (D. Kan. 1979).
Use of "M.D." by osteopath
U.S.—Maceluch v. Wysong, 680 F.2d 1062 (5th Cir. 1982).
Use of "Doctor" by pharmacist
Neb.—State, Dept. of Health v. Hinze, 232 Neb. 550, 441 N.W.2d 593 (1989).
Chiropractor's reference to facility as "hospital"

S.C.—Kale v. South Carolina Dept. of Health and Environmental Control, 301 S.C. 277, 391 S.E.2d 573 (1990).

3 U.S.—Friedman v. Rogers, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979).

4 U.S.—Bolton v. Kansas State Bd. of Healing Arts, 473 F. Supp. 728 (D. Kan. 1979).

Abortion

U.S.—Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), judgment aff'd, 428 U.S. 901, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Speech in aid of pharmaceutical marketing

U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); U.S. v. Caronia, 703 F.3d 149 (2d Cir. 2012).

Prescription drug prices

U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

Compounded drugs

Statutory provisions that exempted compounded drugs from the Food and Drug Administration's drug approval requirements if providers of such drugs refrained from advertising, promoting, or soliciting prescriptions for particular compounded drugs were unconstitutional restrictions of commercial speech; Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002).

5 U.S.—Bolton v. Kansas State Bd. of Healing Arts, 473 F. Supp. 728 (D. Kan. 1979).

6 U.S.—Baker v. Registered Dentists of Oklahoma, 543 F. Supp. 1177 (W.D. Okla. 1982).

7 Ark.—Culpepper v. Arkansas Bd. of Chiropractic Examiners, 343 Ark. 467, 36 S.W.3d 335 (2001).

8 La.—Gregory v. Louisiana Bd. of Chiropractic Examiners, 608 So. 2d 987 (La. 1992).

9 U.S.—Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233 (2d Cir. 2014), petition for certiorari filed, 135 S. Ct. 435, 190 L. Ed. 2d 327 (2014) and petition for certiorari filed, 135 S. Ct. 435, 190 L. Ed. 2d 327 (2014).

10 U.S.—Texas Medical Providers Performing Abortion Services v. Lakey, 667 F.3d 570 (5th Cir. 2012); Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012).

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16B C.J.S. Constitutional Law § 947

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

b. Regulated Businesses and Professions

§ 947. Regulated commercial speech of attorneys

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541, 1600, 2040 to 2049

A.L.R. Library

Propriety of Radio and Television Attorney Advertisements, 20 A.L.R.6th 385
Advertising as ground for disciplining attorney, 30 A.L.R.4th 742 (sec. 10 superseded in part Propriety of Radio and Television Attorney Advertisements, 20 A.L.R.6th 385).
Modern status of law regarding solicitation of business by or for attorney, 5 A.L.R.4th 866.

Attorney advertising is commercial speech protected to some extent by the First Amendment.

Attorney advertising is commercial speech protected by the First Amendment,[1] and a blanket restriction on lawyer advertising is unconstitutional.[2] If an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct.[3]

The First Amendment's protection of lawyer advertising is not absolute,[4] and various disciplinary rules imposing limitations on such advertising have been held not to infringe on attorneys' right of commercial speech.[5] The government may regulate or prohibit misleading advertising[6] and may regulate the time, place, and manner of advertising by attorneys by reasonable statutes or rules.[7]

Although solicitation by an attorney is a form of advertising, not all such solicitation is protected from reasonable regulation by the constitutional guaranty.[8] While attorneys cannot be totally prohibited from targeting mail advertising to victims, claimants, or relatives of individuals involved in personal injury and wrongful death claims,[9] a state bar may impose restrictions on targeted solicitation, such as a waiting period during which an attorney may not send a direct mail solicitation to an accident or disaster victim or his or her relative.[10] While it has been held that a state cannot constitutionally prohibit truthful and noncoercive lawyer solicitation on behalf of a nonprofit organization,[11] it has also been held that a state may categorically ban in-person or telephone solicitation by attorneys for profit.[12]

An attorney has a First Amendment right to advertise his or her certification as a trial specialist by the national board of trial advocacy in a state which lacks its own certification program.[13] Similarly, an attorney may use the designation "certified financial planner" in his or her commercial communications where that use is not deceptive.[14]

Attorneys may validly be prohibited from the use of trade names[15] or the use of a firm name when those named are not all members or former members of the bar of the state.[16] Listings of areas of law practice which are unexplained or which are accompanied by a disclaimer of specialization or expertise may also be prohibited.[17] However, it is a violation of the First Amendment to prohibit attorneys from identifying jurisdictions in which they are licensed to practice;[18] to forbid an attorney to use an extra-legal professional designation, such as "CPA," in advertisements for his or her law practice;[19] or to limit listing of areas of practice to those specified by regulation and requiring listing to be in identical language.[20] Invalid regulations also include prohibition of advertisement of routine services without giving prices.[21]

Rules governing attorney advertising and solicitation must further a substantial state interest,[22] such as protecting the privacy of potential clients,[23] and must be narrowly drawn[24] so that they are no broader than reasonably necessary to protect that interest.[25] When a regulatory body seeks to restrict lawyer advertising, whether directly or indirectly, it must resolve any doubts in favor of permitting the constitutionally protected speech.[26]

Footnotes

1 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).
Ga.—Matter of Robbins, 266 Ga. 681, 469 S.E.2d 191 (1996).
Irrelevant, unverifiable, and noninformational advertising protected
U.S.—Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010).

2 U.S.—Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

Conn.—Grievance Committee for Hartford-New Britain Judicial Dist. v. Trantolo, 192 Conn. 15, 470 A.2d 228 (1984).

3 Colo.—In re Green, 11 P.3d 1078 (Colo. 2000).

4 Fla.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

Ga.—Matter of Robbins, 266 Ga. 681, 469 S.E.2d 191 (1996).

5 Fla.—The Florida Bar v. Herrick, 571 So. 2d 1303 (Fla. 1990).

Iowa—Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Wherry, 569 N.W.2d 822 (Iowa 1997).

Tenn.—Walker v. Board of Professional Responsibility of Supreme Court of Tennessee, 38 S.W.3d 540 (Tenn. 2001).

6 U.S.—Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

Ga.—Matter of Robbins, 266 Ga. 681, 469 S.E.2d 191 (1996).

S.C.—In re Anonymous Member of South Carolina Bar, 385 S.C. 263, 684 S.E.2d 560 (2009).

Portrayal of client by nonclient without disclaimer

A Louisiana Rule of Professional Conduct (RPC) which prohibited attorney advertisements that included portrayal of a client by a nonclient without disclaimer, or the depiction of any events or scenes or pictures that were not actual or authentic without disclaimer, satisfied First Amendment requirements where the required disclaimers were reasonably related to the State's interests in preventing consumer deception and were sufficiently related to the substantial interest in promoting the ethical integrity of the legal profession.

U.S.—Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd., 632 F.3d 212 (5th Cir. 2011).

Implication of favorable result

Attorneys' four television advertisements which depicted an insurance company strategy session were not protected as commercial speech under the First Amendment; the advertisements implied favorable a result in cases involving insurance companies based on the law firm's reputation with insurance companies, and the advertisements were more likely to deceive the public than inform it.

Ind.—In re Keller, 792 N.E.2d 865 (Ind. 2003).

7 U.S.—Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

Ark.—Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980).

8 Cal.—In re Arnoff, 22 Cal. 3d 740, 150 Cal. Rptr. 479, 586 P.2d 960 (1978).

Kan.—State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982).

9 Fla.—The Florida Bar: Petition to Amend. the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990).

Okla.—Cummings & Associates, Inc. v. City of Oklahoma City ex rel. Oklahoma City Police Dept., 1993 OK 36, 849 P.2d 1087 (Okla. 1993).

10 U.S.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

11 Mass.—Matter of Amendment to S.J.C. Rule 3:07, 398 Mass. 73, 495 N.E.2d 282 (1986).

12 La.—Louisiana State Bar Ass'n v. St. Romain, 560 So. 2d 820 (La. 1990).

W. Va.—Lawyer Disciplinary Bd. v. Allen, 198 W. Va. 18, 479 S.E.2d 317, 61 A.L.R.5th 891 (1996).

13 U.S.—Peel v. Attorney Registration and Disciplinary Com'n of Illinois, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).

14 U.S.—Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

15 Ind.—Matter of Sekerez, 458 N.E.2d 229 (Ind. 1984), reinstatement granted, 553 N.E.2d 844 (Ind. 1990).

Md.—Matter of Oldtowne Legal Clinic, P.A., 285 Md. 132, 400 A.2d 1111 (1979).

16 N.J.—On Petition for Review of Opinion 475 of Advisory Committee on Professional Ethics, 89 N.J. 74, 444 A.2d 1092, 33 A.L.R.4th 381 (1982).

17 U.S.—Lovett and Linder, Ltd. v. Carter, 523 F. Supp. 903 (D.R.I. 1981).

18 U.S.—In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

19 U.S.—Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

20 U.S.—In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

21 U.S.—Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), aff'd, 698 F.2d 1218 (6th Cir. 1982).

Estimate of costs

A disciplinary rule requiring that a reasonably accurate estimate of court costs be included in an attorney's advertisement, as applied to price advertisements for legal services which do not include any specific cost estimates but do include a statement that fees do not include court costs, unconstitutionally restricts attorneys' First Amendment rights.

Ala.—Lyon v. Alabama State Bar, 451 So. 2d 1367 (Ala. 1984).

22 Ga.—Matter of Robbins, 266 Ga. 681, 469 S.E.2d 191 (1996).

Ky.—Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978).

23 Fla.—Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

24 La.—Louisiana State Bar Ass'n v. St. Romain, 560 So. 2d 820 (La. 1990).

25 U.S.—In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

Ga.—Matter of Robbins, 266 Ga. 681, 469 S.E.2d 191 (1996).

26 Ky.—In re Hughes & Coleman, 60 S.W.3d 540 (Ky. 2001).

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16B C.J.S. Constitutional Law § 948

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

5. Commercial Speech

b. Regulated Businesses and Professions

§ 948. Regulated commercial speech in connection with liquor business

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541, 1600, 1601, 1613

States may control speech in connection with the sale of liquor.

Since the Twenty-First Amendment to the United States Constitution bestows on the states regulatory power over the liquor traffic greater than the normal state authority over public health, welfare, and morals which is derived from the police power,[1] states may control speech or related activity in connection with the sale of liquor, even by absolutely prohibiting it, even though in other circumstances the speech or activity would be protected in whole or in part by the First Amendment guaranty of freedom of speech so that the regulation would be void as an impermissible abridgment of that freedom.[2] However, where a state chooses to permit advertising of alcoholic beverages, regulations governing such advertising are subject to some of the same constitutional freedoms as other commercial speech.[3] Thus, a restriction on advertising by alcoholic beverage licensees is invalid where it serves no state interest[4] or does not advance the interest asserted to justify it.[5] However, the right of a liquor licensee to freedom of commercial speech is not absolute[6] and regulations reasonably related to the public interest are valid.[7] Solicitation of drinks by an employee of a retailer of liquor has been held to be commercial speech which may be prohibited by law.[8]

Where a state constitution contains no provision comparable to the Twenty-First Amendment, the right of free speech guaranteed by that constitution has no parallel limited status in premises where alcoholic beverages are sold.[9] Thus, the guaranty of freedom of speech under a state constitution may invalidate regulations of certain activities in establishments selling liquor which would not be protected by the First Amendment as qualified by the Twenty-First Amendment.[10]

Footnotes

1 C.J.S., Intoxicating Liquors §§ 51, 52.

2 U.S.—New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981).
Mass.—Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547, 374 N.E.2d 1181 (1978).

3 U.S.—Authentic Beverages Co., Inc. v. Texas Alcoholic Beverage Com'n, 835 F. Supp. 2d 227 (W.D. Tex. 2011).
Del.—Brooks v. State, Through Alcoholic Beverage Control Commission, 442 A.2d 93 (Del. Super. Ct. 1981).
Ga.—Folsom v. City of Jasper, 279 Ga. 260, 612 S.E.2d 287 (2005).
Statute disfavoring certain forms of commercial speech
A California statute governing advertising by alcohol producers disfavored certain forms of commercial speech by alcohol manufacturers, paid advertisements in retail stores, and thus was not content-neutral time, place, or manner restriction under First Amendment.
U.S.—Retail Digital Network, LLC v. Appelsmith, 945 F. Supp. 2d 1119 (C.D. Cal. 2013).

4 Del.—Brooks v. State, Through Alcoholic Beverage Control Commission, 442 A.2d 93 (Del. Super. Ct. 1981).
Ill.—Walgreen Co. v. Illinois Liquor Control Commission, 101 Ill. App. 3d 216, 56 Ill. Dec. 761, 427 N.E.2d 1307 (3d Dist. 1981).

5 U.S.—Authentic Beverages Co., Inc. v. Texas Alcoholic Beverage Com'n, 835 F. Supp. 2d 227 (W.D. Tex. 2011).
Promotion of temperance
U.S.—Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Com'n, 539 F. Supp. 817 (S.D. Miss. 1982), aff'd in part, rev'd in part on other grounds, 701 F.2d 314 (5th Cir. 1983), on reh'g, 718 F.2d 738 (5th Cir. 1983).

6 Ill.—Walgreen Co. v. Illinois Liquor Control Commission, 101 Ill. App. 3d 216, 56 Ill. Dec. 761, 427 N.E.2d 1307 (3d Dist. 1981).

7 Del.—Brooks v. State, Through Alcoholic Beverage Control Commission, 442 A.2d 93 (Del. Super. Ct. 1981).

8 Tex.—Allen v. State, 604 S.W.2d 191 (Tex. Crim. App. 1980).

9 Alaska—Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982).
Mass.—Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commission (No. 1), 374 Mass. 547, 374 N.E.2d 1181 (1978).

10 Alaska—Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982).
N.Y.—Bellanca v. New York State Liquor Authority, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981).
No preferred position to regulation of alcoholic beverages
While the Twenty-First Amendment's grant of regulatory power over alcohol sales to the states has historically been read to limit the First Amendment's protection of expressive conduct in establishments licensed to serve alcohol, no provision of the Massachusetts Declaration of Rights gives a preferred position to regulation of alcoholic beverages.
U.S.—Showtime Entertainment, LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

a. In General

§ 949. Limitations and restrictions on right of free speech, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1504 to 1529, 1725, 1800

Freedoms of speech and of the press are not absolute or unqualified rights but are subordinate to the greater rights of general public interest and to the right of government to maintain and protect itself, and they are subject to reasonable restrictions when necessary to safeguard the public interest.

Freedom of speech and of the press is not an absolute or unqualified right[1] and does not leave people at liberty to publicize their views whenever and however and wherever they please.[2] The rights are subject to reasonable restrictions.[3]

First Amendment rights are subordinate to the greater rights of general public interest and the right of government to maintain and protect itself.[4] The guaranteed freedom of speech and press does not afford one the right to encourage and solicit resistance to the execution of laws,[5] to obstruct government operations,[6] or to impede or interfere with the orderly administration of justice.[7]

The constitutional guaranties are subject to certain limitations, including the legitimate exercise of the police power,[8] the inherent right of the courts to punish for contempt,[9] and liability for libel and slander.[10]

CUMULATIVE SUPPLEMENT

Cases:

For purposes of First Amendment analysis, the fact that a distinction is speaker based does not automatically render the distinction content neutral. (Per Justice Kavanaugh, with three Justices concurring and two Justices concurring in the judgment.) U.S. Const. Amend. 1. Barr v. American Association of Political Consultants, Inc, 140 S. Ct. 2335 (2020).

For purposes of First Amendment analysis, exceptions to a speech restriction may diminish the credibility of the government's rationale for restricting speech in the first place. (Per Justice Kavanaugh, with two Justices concurring and four Justices concurring in the judgment.) U.S. Const. Amend. 1. Barr v. American Association of Political Consultants, Inc, 140 S. Ct. 2335 (2020).

Even speech that is protected under the First Amendment is not equally permissible in all places and at all times, and it may be subject to reasonable time, place, or manner restrictions. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002); Del Gallo v. Parent, 557 F.3d 58 (1st Cir. 2009); U.S. v. Martinez, 736 F.3d 981 (11th Cir. 2013).
Conn.—State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014).
Neb.—State v. Drahota, 280 Neb. 627, 788 N.W.2d 796 (2010).
N.H.—State v. Biondolillo, 164 N.H. 370, 55 A.3d 1034 (2012).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

2 U.S.—Wood v. Moss, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981); Zalaski v. City of Bridgeport Police Dept., 613 F.3d 336 (2d Cir. 2010); Occupy Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013).
Colo.—Hill v. Thomas, 973 P.2d 1246 (Colo. 1999), judgment aff'd, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).
N.Y.—People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
As to time, place, and manner restrictions on speech, see § 942.

3 U.S.—Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).
Ga.—State v. Cafe Erotica, Inc., 269 Ga. 486, 500 S.E.2d 574 (1998).
Wash.—Knudsen v. Washington State Executive Ethics Bd., 156 Wash. App. 852, 235 P.3d 835, 258 Ed. Law Rep. 786 (Div. 3 2010).

4 Fla.—Lieberman v. Marshall, 236 So. 2d 120 (Fla. 1970).
Ky.—McDonald v. Ethics Committee of the Kentucky Judiciary, 3 S.W.3d 740 (Ky. 1999), as amended, (Nov. 15, 1999).
N.C.—State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

5 U.S.—U.S. v. Moss, 604 F.2d 569 (8th Cir. 1979).

Va.—Thomas v. City of Danville, 207 Va. 656, 152 S.E.2d 265 (1967).

Obstruction of officers

Comments which invite crowds to gather and which obstruct the performance of duties by officers, thus creating a hostile environment, are not constitutionally protected.

N.Y.—Naples v. State Liquor Authority, 43 A.D.2d 801, 350 N.Y.S.2d 262 (4th Dep't 1973).

6 U.S.—Burch v. City of Florence, Ala., 913 F. Supp. 2d 1221 (N.D. Ala. 2012).

7 As to interference with judicial proceedings, generally, see § 965.

8 § 964.

9 § 965.

10 § 1051.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

a. In General

§ 950. Limitations and restrictions on right of free speech based on interference with rights of others

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1491, 1498, 1504 to 1529, 1549, 1557 to 1562, 1725, 1800

The right of free speech must be exercised with reasonable regard for the rights of others.

The right of free speech must be exercised with reasonable regard for the conflicting rights of others[1] as one individual does not have a right to use free speech to the injury of another.[2]

The constitutional provisions do not add anything to the rights of one citizen as against another and do not, generally, inhibit action by individuals with respect to their property.[3] The right to speak freely does not sanction a trespass[4] and does not imply the right to make a speech or distribute literature on another's private premises without his or her permission.[5] The right to free speech and writing is not the right to force speech or writing on an unwilling audience or readers.[6]

CUMULATIVE SUPPLEMENT

Cases:

County sheriff's office's actions in requiring Christian evangelists to leave city festival celebrating Arab culture after crowd made up predominantly of adolescents began hurling debris at them effectuated heckler's veto, in violation of evangelists' free speech rights, where evangelists remained calm and peaceful, and officers made little effort to control hecklers, despite substantial police presence, but instead threatened to arrest evangelists for disorderly conduct. U.S.C.A. Const.Amend. 1. Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

Businesses were not barred from pursuing their void-for-vagueness free speech challenge, to Florida statute making it a misdemeanor to impose a surcharge on a buyer for electing to use a credit card, based on fact that they were seeking pre-enforcement review, since litigants who were being chilled from engaging in constitutional activity would suffer a discrete harm independent of enforcement, and that harm created the basis for Court of Appeals' jurisdiction. U.S.C.A. Const.Amend. 1; West's F.S.A. § 501.0117. Dana's R.R. Supply v. Attorney General, Florida, 807 F.3d 1235 (11th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Evans v. State Bd. of Agriculture, 325 F. Supp. 1353 (D. Colo. 1971); James v. West Virginia Bd. of Regents, 322 F. Supp. 217 (S.D. W. Va. 1971), judgment aff'd, 448 F.2d 785 (4th Cir. 1971).
Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).
Privacy interests
U.S.—Ostergren v. Cuccinelli, 615 F.3d 263 (4th Cir. 2010).
Fla.—Gilbreath v. State, 650 So. 2d 10 (Fla. 1995).
N.Y.—People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).

2 U.S.—Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).
Kan.—State v. Williams, 46 Kan. App. 2d 36, 257 P.3d 849 (2011), judgment aff'd, 299 Kan. 911, 329 P.3d 400, 101 A.L.R.6th 663 (2014).
Copyright infringement
U.S.—Hard Drive Productions, Inc. v. Does 1-1,495, 892 F. Supp. 2d 334 (D.D.C. 2012).
Defamation
Tex.—Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc., 434 S.W.3d 142 (Tex. 2014).
Invasion of privacy
U.S.—Government of Virgin Islands v. Vanterpool, 767 F.3d 157 (3d Cir. 2014).
Mo.—State v. Vaughn, 366 S.W.3d 513 (Mo. 2012).

3 U.S.—Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973).

4 U.S.—Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).
Ga.—Daniel v. State, 231 Ga. 270, 201 S.E.2d 393 (1973).
Or.—Wilson v. Department of Corrections, 259 Or. App. 554, 314 P.3d 994 (2013).

5 U.S.—Buxbom v. City of Riverside, 29 F. Supp. 3 (S.D. Cal. 1939).
Mo.—State v. Phillips, 508 S.W.2d 240 (Mo. Ct. App. 1974).
Unwanted material
A vendor has no right under the constitution or otherwise to send unwanted material into the home of another even if the flow of valid ideas is by such prohibition impeded.

U.S.—Rowan v. U.S. Post Office Dept., 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

6 U.S.—Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980).

Kan.—State v. Cleveland, 205 Kan. 426, 469 P.2d 251 (1970).

Md.—von Lusch v. State, 39 Md. App. 517, 387 A.2d 306 (1978).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

a. In General

§ 951. Rights not included within right of free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490 to 1492, 1497, 1500, 1502, 1504, 1800

The right of free speech and press does not include various other rights, such as a right to be paid for speaking or an unrestrained right to gather information.

Even though freedom of speech and the press includes the opportunity to persuade to action, not merely to describe facts, so that vigorous advocacy is protected,[1] it does not include any guaranty that the speaker's advocacy will be effective[2] or that the government will finance speech or communication.[3]

The right to speak and publish does not carry with it an unrestrained right of citizens generally or of the press to gather information[4] or a right of access to all sources of information not generally available to members of the public.[5] Moreover, the guaranty of freedom of the press does not require government to accord the press special access to information greater than that of the general public.[6]

A prosecution for perjury does not impinge on rights granted by the First Amendment since freedom of speech does not include the freedom to lie under oath.[7]

No cause of action for damages for denial of free speech arises out of the First Amendment.[8]

CUMULATIVE SUPPLEMENT

Cases:

Supreme Court's precedents allow the government to constitutionally impose reasonable time, place, and manner regulations on speech, but the precedents restrict the government from discriminating in the regulation of expression on the basis of the content of that expression. (Per Justice Kavanaugh, with three Justices concurring and two Justices concurring in the judgment.) U.S. Const. Amend. 1. Barr v. American Association of Political Consultants, Inc, 140 S. Ct. 2335 (2020).

[END OF SUPPLEMENT]

Footnotes

1 § 934.

2 U.S.—Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299, 15 Ed. Law Rep. 1050 (1984).
Publicity or continued fervor
The First Amendment does not guarantee news publicity for speakers nor guarantee the continued fervor of one's fellow demonstrators.
U.S.—Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980).

3 U.S.—Presbyterian Hospital of Dallas v. Harris, 638 F.2d 1381 (5th Cir. 1981).

4 U.S.—Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17, 38 Fed. R. Serv. 2d 1606 (1984).
Del.—Gannett Co., Inc. v. State, 571 A.2d 735 (Del. 1989).
S.D.—Sioux Falls Argus Leader v. Miller, 2000 SD 63, 610 N.W.2d 76 (S.D. 2000).

5 U.S.—Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).
Ala.—Ex parte Rudder, 507 So. 2d 411 (Ala. 1987).

6 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013); Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937 (7th Cir. 2015); Clyma v. Sunoco, Inc., 594 F.3d 777 (10th Cir. 2010); Philadelphia Inquirer v. Wetzel, 906 F. Supp. 2d 362 (M.D. Pa. 2012).
Fla.—Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977).
Citizen and media rights equal
W. Va.—Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778 (1986).
Supplying information not compelled
There is an undoubted right to gather news "from any source by means within the law" but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.
U.S.—Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).

7 U.S.—U.S. v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954).

8 U.S.—Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

a. In General

§ 952. Limitations and restrictions on charitable solicitations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490 to 1492, 1497, 1498, 1502, 1509 to 1529, 1725

Appeals for funds for charities may involve protected speech interests but may be restricted by regulations designed to promote a governmental interest.

The First Amendment protects the right to engage in charitable solicitation.[1] Nevertheless, such solicitation may be regulated by government regulations designed to advance a governmental interest[2] where the regulations are narrowly drawn so that they do not interfere with freedom of speech.[3] For instance, a state may maintain a fraud action against a charitable fundraiser that makes false or misleading representations designed to deceive donors about how their donations will be used.[4]

A prior restraint on solicitation for charity bears a heavy presumption of invalidity.[5] A requirement for registering or obtaining a permit to solicit must not be vague[6] and must provide sufficient standards for the exercise of official discretion.[7]

A statute prohibiting a charitable organization, in connection with any fund-raising activity, from paying expenses of more than a specified percentage of the amount raised violates the constitutional right of free speech of the charitable organization.[8]

Footnotes

1 U.S.—Illinois, ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003).
As to charitable solicitation in the streets and door-to-door, see § 990.

2 U.S.—International Soc. for Krishna Consciousness of Berkeley, Inc. v. Kearnes, 454 F. Supp. 116 (E.D. Cal. 1978).
Prevention of fraud
Cal.—People v. Knueppel, 117 Cal. App. 3d 958, 173 Cal. Rptr. 466 (2d Dist. 1980).

3 Cal.—People v. Knueppel, 117 Cal. App. 3d 958, 173 Cal. Rptr. 466 (2d Dist. 1980).

4 U.S.—Illinois, ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003).

5 U.S.—Streich v. Pennsylvania Commission on Charitable Organizations, 523 F. Supp. 1377 (M.D. Pa. 1981).

6 Cal.—Aaron v. Municipal Court, 73 Cal. App. 3d 596, 140 Cal. Rptr. 849 (1st Dist. 1977).

7 U.S.—Conlon v. City of North Kansas City, Mo., 530 F. Supp. 985 (W.D. Mo. 1981).

8 U.S.—Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

b. Unprotected Speech or Printed Matter

§ 953. Unprotected speech or printed matter, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490 to 1492, 1496 to 1498, 1502, 1504 to 1507, 1509 to 1529, 1557 to 1562, 1725, 1800, 2077, 2180, 2245 to 2251

Certain classes of speech, such as libel, obscenity, and fighting words, are not granted constitutional protection.

The First Amendment's right to freedom of speech was not intended to embrace all subjects,[1] and restrictions upon the content of speech are permitted in a few limited areas, which are of so little social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[2] The First Amendment has no application when what is restricted is not protected speech.[3] Thus, no constitutional problem arises from the prevention and punishment of certain well-defined and narrowly limited classes of speech, including defamation, fraud, incitement to a breach of the peace or imminent lawless action, threats, solicitation of crime, obscenity, pornography produced with real children, speech integral to criminal conduct, and words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[4]

To constitute "fighting words," speech, considered objectively, must be abusive and insulting rather than a communication of ideas, and it must actually be used in an abusive manner in a situation which presents an actual danger of causing a breach of the peace.[5] Fighting words do not include expressions which are not intended to offend the person to whom they are directed or which are not likely to cause an immediate breach of the peace.[6] Particular words directed to a police officer may not amount to fighting words even though they might be fighting words if directed at some other person.[7]

Generally, statements may not be punished merely because they are profane and therefore offensive to listeners unless substantial privacy interests are at stake[8] or unless it is clear that the punishable language is limited to fighting words, that is, those which are intended to and are likely to cause an immediate breach of the peace.[9] To lose the protection of the First Amendment's Free-Speech Clause, words must do more than offend, cause indignation, or anger the addressee.[10] Language which is merely vulgar, and is offensive to some persons, may nevertheless be protected where it does not meet the standards of the prohibited classes of speech[11] as governments are generally prohibited by the First Amendment from cleansing public debate to the point where it is palatable to the most squeamish.[12] Thus, profanity is no longer excluded from protection where it is not so used as to amount to fighting words or to cause a breach of the peace.[13] Disgust is not valid basis for restricting expression.[14]

CUMULATIVE SUPPLEMENT

Cases:

No police action that hinders speaker's freedom of speech should be deemed legitimate under First Amendment unless it satisfies strict scrutiny, which requires police to achieve their ends by using only those means that are least restrictive with respect to speaker's First Amendment rights. U.S.C.A. Const.Amend. 1. Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720 (2000).
Unprotected speech
While the scope of the First Amendment is broad, it does not extend to "unprotected speech."
Wash.—State v. Schaler, 169 Wash. 2d 274, 236 P.3d 858 (2010).

2 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); Ostergren v. Cuccinelli, 615 F.3d 263 (4th Cir. 2010).
Ill.—City of Chicago v. Pooh Bah Enterprises, Inc., 224 Ill. 2d 390, 309 Ill. Dec. 770, 865 N.E.2d 133 (2006).
N.D.—State v. Brossart, 2015 ND 1, 858 N.W.2d 275 (N.D. 2015).
Wash.—State v. Johnston, 156 Wash. 2d 355, 127 P.3d 707 (2006).
Speech utterly without redeeming value
Some speech is so offensive to the rights of others or utterly without redeeming literary, artistic, political, or scientific value that it is unprotected by the First Amendment.
U.S.—Policastro v. Tenafly Bd. of Educ., 710 F. Supp. 2d 495, 260 Ed. Law Rep. 129 (D.N.J. 2010), aff'd, 438 Fed. Appx. 153 (3d Cir. 2011).
Epithets or personal abuse
Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the First Amendment, and its punishment as a criminal act raises no question under that instrument.

Mo.—State v. Wooden, 388 S.W.3d 522 (Mo. 2013).

3 U.S.—Nevada Com'n on Ethics v. Carrigan, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011).

4 U.S.—U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Sayer, 748 F.3d 425 (1st Cir. 2014); Doe v. Boland, 698 F.3d 877 (6th Cir. 2012), cert. denied, 133 S. Ct. 2825, 186 L. Ed. 2d 883 (2013); U.S. v. Brune, 767 F.3d 1009 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015).

Ariz.—In re Nickolas S., 226 Ariz. 182, 245 P.3d 446, 263 Ed. Law Rep. 419 (2011).

Minn.—State v. Melchert-Dinkel, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).

W. Va.—State v. Yocum, 233 W. Va. 439, 759 S.E.2d 182 (2014).

As to obscenity, see § 955.

Objective or "true" threats

U.S.—U.S. v. Szabo, 760 F.3d 997 (9th Cir. 2014); U.S. v. Martinez, 736 F.3d 981 (11th Cir. 2013).

Cal.—People v. Lowery, 52 Cal. 4th 419, 128 Cal. Rptr. 3d 648, 257 P.3d 72 (2011).

D.C.—In re S.W., 45 A.3d 151 (D.C. 2012).

N.D.—State v. Brossart, 2015 ND 1, 858 N.W.2d 275 (N.D. 2015).

Legislature may not expand list

While there are limited exceptions to the prohibition against content-based governmental restrictions on expression, for obscenity, incitement and fighting words, new categories of unprotected speech may not be added to the list by a legislature which concludes that certain speech is too harmful to be tolerated.

U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

5 U.S.—Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), judgment aff'd, 578 F.2d 1197 (7th Cir. 1978).

Ohio—Urbana v. Locke, 170 Ohio App. 3d 246, 2006-Ohio-6606, 866 N.E.2d 1099 (2d Dist. Champaign County 2006).

Racial epithets

U.S.—Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383 (E.D. Pa. 1980).

N.C.—In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Outrageous criticisms of public figures

Even when criticisms of public figures are outrageous, if they fall short of provoking an immediate breach of the peace, they are protected by the First Amendment's Free-Speech Clause.

Neb.—State v. Drahota, 280 Neb. 627, 788 N.W.2d 796 (2010).

6 U.S.—Hammond v. Adkisson, 536 F.2d 237 (8th Cir. 1976).

Ala.—Skelton v. City of Birmingham, 342 So. 2d 937 (Ala. 1976).

Indignation, disgust, or anger

A state may not punish the use of words that merely elicit indignation, disgust, or anger from the addressee.

R.I.—State v. McKenna, 415 A.2d 729 (R.I. 1980).

7 **Response to unlawful police conduct**

Md.—Diehl v. State, 294 Md. 466, 451 A.2d 115 (1982).

Special considerations

The nature of the experience, training, and responsibilities of police officers must be considered in determining whether words of a particular defendant constituted fighting words.

Me.—State v. John W., 418 A.2d 1097, 14 A.L.R.4th 1238 (Me. 1980).

8 Neb.—State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990).

9 U.S.—Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

N.H.—State v. Dyer, 98 N.H. 59, 94 A.2d 718 (1953).

Wash.—City of Seattle v. Appleget, 5 Wash. App. 202, 486 P.2d 1155 (Div. 1 1971).

10 Neb.—State v. Drahota, 280 Neb. 627, 788 N.W.2d 796 (2010).

11 U.S.—Aiello v. City of Wilmington, Del., 623 F.2d 845 (3d Cir. 1980).

R.I.—State v. McKenna, 415 A.2d 729 (R.I. 1980).

12 U.S.—Salvail v. Nashua Bd. of Ed., 469 F. Supp. 1269 (D.N.H. 1979).

13 **Threatened breach of peace**

A statute prohibiting the use of profane language in public would be valid only if interpreted to require that language be spoken in circumstances which threaten a breach of peace.

U.S.—Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969).

R.I.—State v. Authelet, 120 R.I. 42, 385 A.2d 642, 5 A.L.R.4th 942 (1978).

14 U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

b. Unprotected Speech or Printed Matter

§ 954. Speech part of unlawful conduct

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490 to 1492, 1497, 1504, 1509 to 1529, 1559, 1560, 1725, 1800, 1801, 1807 to 1834

Threats, intimidation, and speech that is otherwise part of unlawful conduct are not constitutionally protected.

The constitutional guaranty of freedom of speech and of the press was not intended as a license for illegality or an invitation for fraud,[1] and the fact that a course of conduct was in part initiated, evidenced, or carried out by means of spoken, written, or printed language does not alone establish that the freedom of speech or press is abridged by making the course of conduct illegal.[2] Therefore, speech which is part of unlawful conduct[3] and behavior which is made unlawful by legitimate legislation or regulation enacted for a purpose unrelated to the suppression of free expression[4] is not protected. Government may regulate or ban speech in which a person proposes an illegal transaction,[5] and blackmail,[6] extortion[7] are not protected speech under the First Amendment simply because they involve speech. Moreover, the guaranty does not shelter acts of force and violence, coercion, or intimidation.[8]

Speech which is directed to inciting or producing imminent lawless action and which is likely to incite or produce such action is without the protection of the guaranty.[9] Freedom of speech and press does not include the right to use any force, whether direct, such as bodily harm, or indirect, such as threats, either of immediate bodily harm or of hunger or loss of work, to any other human being.[10]

CUMULATIVE SUPPLEMENT

Cases:

Specific criminal acts are not protected speech under the First Amendment even if speech is the means for their commission. U.S.C.A. Const.Amend. 1. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

It is not an abridgment of freedom of speech or freedom of the press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. U.S.C.A. Const.Amend. 1. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

When the scienter requirement of a statute sufficiently limits criminal culpability to reach only conduct outside the protection of the First Amendment, legitimate speech is not endangered. U.S. Const. Amend. 1. State v. Calaycay, 449 P.3d 1184 (Haw. 2019).

Criminal statute making it unlawful to recklessly expose another person to HIV without that person's knowledge and consent to the exposure regulated conduct, rather than speech, and thus did not violate state or federal constitutional provisions protecting freedom of speech; while statute could compel disclosure as a practical matter, because there would be no other way to be sure that a potential sexual partner knew of the HIV infection and consented to being exposed to HIV, statute restricted what individuals could do, rather than what they might say, such that any speech compelled by statute was incidental to its regulation of targeted conduct. U.S. Const. Amend. 1; Mo. Const. art. 1, § 8; Mo. Ann. Stat. § 191.677. State v. S.F., 483 S.W.3d 385 (Mo. 2016).

[END OF SUPPLEMENT]

Footnotes

1 N.Y.—Application of Bohlinger, 199 Misc. 941, 106 N.Y.S.2d 953 (Sup 1951), order aff'd, 280 A.D. 517, 113 N.Y.S.2d 755 (1st Dep't 1952), order aff'd, 305 N.Y. 258, 112 N.E.2d 280 (1953).

2 U.S.—Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978); U.S. v. Sayer, 748 F.3d 425 (1st Cir. 2014).
Fla.—State v. Elder, 382 So. 2d 687 (Fla. 1980).
Ill.—People v. Thompson, 85 Ill. App. 3d 964, 41 Ill. Dec. 263, 407 N.E.2d 761 (1st Dist. 1980).

3 U.S.—U.S. v. Petrovic, 701 F.3d 849 (8th Cir. 2012).
Tenn.—State v. Mitchell, 343 S.W.3d 381 (Tenn. 2011).
W. Va.—State v. Yocum, 233 W. Va. 439, 759 S.E.2d 182 (2014).
Words the very vehicle of crime
Speech is not protected by the First Amendment when it is the very vehicle of the crime itself.
U.S.—U.S. v. Stewart, 590 F.3d 93 (2d Cir. 2009); U.S. v. White, 670 F.3d 498 (4th Cir. 2012).
Increasing power to regulate
As speech strays further from values of persuasion, dialogue, and free exchange of ideas and moves toward willful threats to perform illegal acts, the State has greater latitude to regulate expression.
Cal.—In re M.S., 10 Cal. 4th 698, 42 Cal. Rptr. 2d 355, 896 P.2d 1365 (1995).

4 U.S.—New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), judgment aff'd, 457 U.S. 702, 102 S. Ct. 2672, 73 L. Ed. 2d 327 (1982); Bullock v. Mumford, 509 F.2d 384 (D.C. Cir. 1974).

5 U.S.—Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743 (5th Cir. 2008).

6 N.Y.—Posner v. Lewis, 18 N.Y.3d 566, 942 N.Y.S.2d 447, 965 N.E.2d 949 (2012).

7 U.S.—U.S. v. Larson, 807 F. Supp. 2d 142 (W.D. N.Y. 2011).

N.Y.—Posner v. Lewis, 18 N.Y.3d 566, 942 N.Y.S.2d 447, 965 N.E.2d 949 (2012).and bribery

Tex.—Roberts v. State, 278 S.W.3d 778 (Tex. App. San Antonio 2008), petition for discretionary review refused, (Oct. 7, 2009).

8 U.S.—Abernathy v. Conroy, 429 F.2d 1170 (4th Cir. 1970); Henry v. First Nat. Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979).

Ariz.—State v. Jacobs, 119 Ariz. 30, 579 P.2d 68 (Ct. App. Div. 1 1978).

9 U.S.—Masson v. Slaton, 320 F. Supp. 669 (N.D. Ga. 1970); Ascheim v. Quinlan, 314 F. Supp. 685 (W.D. Pa. 1970).

Fla.—McKenney v. State, 388 So. 2d 1232 (Fla. 1980).

Ind.—State v. New, 421 N.E.2d 626 (Ind. 1981).

As to the clear and present danger test as excepting speech directed to inciting or producing imminent lawless action and likely to produce it from speech which merely advocates violation of law, see § 963.

Illegal sex acts

Defendant did not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts.

U.S.—U.S. v. Bailey, 228 F.3d 637, 2000 FED App. 0349P (6th Cir. 2000).

10 U.S.—James v. West Virginia Bd. of Regents, 322 F. Supp. 217 (S.D. W. Va. 1971), judgment aff'd, 448 F.2d 785 (4th Cir. 1971).

Communicating threat

Anyone who "communicates a threat" within the meaning of a terrorizing statute forfeits protection of the First Amendment.

Me.—State v. Porter, 384 A.2d 429 (Me. 1978).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

b. Unprotected Speech or Printed Matter

§ 955. Obscenity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1504, 1497, 1499, 1509 to 1529, 1547 to 1549, 2190, 2191, 2192, 2226

Obscenity and pornography are generally not protected speech, but these classes are strictly delimited, and speech or printed matter which is not within the strict definitions remains protected by the guaranties of freedom of speech and press.

Obscene speech or writing is not protected by free speech and press guaranties.[1] Speech or writing is obscene when, and only when, as viewed by an average person applying contemporary community standards and taken as a whole, it appeals to the prurient interest in sex, portrays sexual conduct in a patently offensive manner, and has no serious literary, artistic, political, or scientific value.[2] Speech and print expressions which do not embody all of these elements cannot be excluded from the protection of the guaranties even though they are sexually oriented[3] or deal with sexual matters in a manner which is offensive to some persons.[4] The work must be considered as a whole, and where a scene which, in isolation, might be offensive, is part of the narrative, the work itself does not for this reason become obscene.[5]

Child pornography is not protected by the guaranty of freedom of speech and press,[6] provided the restrictions imposed adequately define it.[7]

Where speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment[8] even if it is sexually explicit and distasteful.[9] Pornography[10] and nude dancing[11] are protected under the First Amendment. A statute aimed directly at the suppression of sexually explicit material is content-based and is presumed to be violative of the First Amendment.[12] To survive judicial scrutiny, a content-based regulation of sexually explicit material must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end.[13]

There is no constitutional barrier to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.[14]

CUMULATIVE SUPPLEMENT

Cases:

Municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech at sexually-oriented businesses, and thus, municipalities need not demonstrate through empirical data that a restriction on protected speech furthers the substantial governmental interest in regulating such secondary effects. U.S. Const. Amend. 1. Doe I v. Landry, 909 F.3d 99 (5th Cir. 2018).

Municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech at sexually-oriented businesses, and thus, municipalities need not demonstrate through empirical data that a restriction on protected speech furthers the substantial governmental interest in regulating such secondary effects. U.S. Const. Amend. 1. Doe I v. Landry, 905 F.3d 290 (5th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002); Kagan v. City of New Orleans, La., 753 F.3d 560 (5th Cir. 2014), cert. denied, 135 S. Ct. 1403 (2015).
Del.—Fink v. State, 817 A.2d 781 (Del. 2003).
Ga.—McKenzie v. State, 279 Ga. 265, 626 S.E.2d 77 (2005).
S.D.—State v. Martin, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).
Wash.—State v. Kilburn, 151 Wash. 2d 36, 84 P.3d 1215 (2004), as amended, (Feb. 17, 2004).
Obscene speech may be constitutionally proscribed
Speech that is obscene or defamatory may be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.
U.S.—Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

2 U.S.—Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002).
Ind.—Adams v. State, 804 N.E.2d 1169 (Ind. Ct. App. 2004).
S.D.—State v. Martin, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).

3 U.S.—Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).
Ohio—Cincinnati v. Jenkins, 146 Ohio App. 3d 27, 764 N.E.2d 1088 (1st Dist. Hamilton County 2001).

4 U.S.—Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297 (7th Cir. 1973).

5 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

6 U.S.—New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).
N.H.—State v. Dowman, 151 N.H. 162, 855 A.2d 524 (2004).
S.D.—State v. Martin, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).
Wis.—State v. Schaefer, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760 (Ct. App. 2003).
Virtual child pornography
A statutory ban on virtual child pornography was overbroad where the government showed only a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse, the ban was not narrowly drawn, and there was no underlying crime.
U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

7 U.S.—New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

8 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

9 U.S.—Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981).

10 Or.—League of Oregon Cities v. State, 334 Or. 645, 56 P.3d 892 (2002), subsequent determination, 336 Or. 593, 87 P.3d 672 (2004) and subsequent determination, 338 Or. 57, 107 P.3d 626 (2005), opinion after grant of review, 339 Or. 186, 118 P.3d 256 (2005).
S.D.—State v. Martin, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).

11 U.S.—Entertainment Productions, Inc. v. Shelby County, Tenn., 721 F.3d 729 (6th Cir. 2013), cert. denied, 134 S. Ct. 906, 187 L. Ed. 2d 778 (2014).
Mass.—Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (2005).
Or.—Fidanque v. Myers, 342 Or. 485, 155 P.3d 867 (2007).
Expressive conduct
Erotic nude dancing is "expressive conduct" within the outer ambit of the First Amendment's protection.
U.S.—City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

12 N.J.—Township of Saddle Brook v. A.B. Family Center, Inc., 307 N.J. Super. 16, 704 A.2d 81 (App. Div. 1998), judgment aff'd and remanded, 156 N.J. 587, 722 A.2d 530 (1999).

13 U.S.—Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702 (D. Del. 1998), judgment aff'd, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).
Restrictions permissible
Restrictions on sexually explicit expression are constitutionally permissible if they further a substantial governmental interest unrelated to the suppression of free expression, specifically, the amelioration of adverse secondary effects associated with adult establishments; they are narrowly tailored; and they do not unreasonably limit alternative avenues of communication.
U.S.—Entertainment Productions, Inc. v. Shelby County, Tenn., 588 F.3d 372 (6th Cir. 2009).

14 U.S.—Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

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16B C.J.S. Constitutional Law § 956

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 956. Content-based restrictions on free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1517, 1518, 1526 to 1528, 1580, 1800, 1801, 1804

Protected speech may not generally be regulated by governments on the basis of the content of the speech.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on basis of ideas or views expressed are content-based[1] while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral.[2] Prohibition of public discussion on an entire topic is also considered a content-based regulation of speech.[3] A regulation that serves purposes unrelated to the content of expression is deemed neutral, as opposed to content based, even if it has an incidental effect on some speakers or messages but not others.[4] The question in such a case is whether the law is justified without reference to the content of the regulated speech.[5]

As general matter, government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[6] Thus, with very limited exceptions,[7] as where government is regulating commercial speech[8] or where the content of speech places it in one of the categories of speech which is not protected by the First Amendment guaranty of freedom of

speech and press,[9] regulation of speech cannot be based on its content without violating the guaranty of freedom of speech.[10] A scheme of regulation which permits some speech and refuses to permit other speech based on differences in content,[11] which distinguishes among different speakers, allowing speech by some but not others,[12] or which favors some viewpoints or ideas at the expense of others,[13] is generally void as an impermissible abridgment of freedom of speech. The government is also constitutionally disqualified from dictating the subjects about which persons may speak, and speakers who may address a public issue,[14] although the fact that an injunction applies to people with a particular viewpoint does not itself render the injunction content or viewpoint based.[15] A content-based regulation of speech is strongly[16] presumed to be invalid.[17]

Strict scrutiny is employed to determine the constitutionality of a content-basedregulation of protected speech.[18] To justify a content-based regulation, there must be a compelling governmental interest in limiting speech,[19] and the regulation must be narrowly drawn to achieve that interest.[20] The government must choose the least restrictive means to further the articulated interest.[21] If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative,[22] and a content-based prohibition of speech is not justified merely by showing that the speaker has an alternative means of communication.[23] These requirements may be less rigorously applied where the interest to be served by the restriction is a competing constitutional interest.[24]

The chilling effect of a statute or regulation, which deters the exercise of protected speech and press rights by the mere threat of its enforcement, may amount to an infringement of those rights.[25] For instance, a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.[26]

CUMULATIVE SUPPLEMENT

Cases:

A core postulate of free speech law is that the government may not discriminate against speech based on the ideas or opinions it conveys. U.S. Const. Amend. 1. Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

A law disfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment. U.S. Const. Amend. 1. Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

As a general matter, content-based regulations of speech are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests, which is a stringent standard. U.S.C.A. Const.Amend. 1. National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

When a "content-based law," a restriction on speech that targets the content of the message conveyed, restricts speech in a traditional public forum, it raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing, a particularly worrisome form of governmental regulation of free expression, and thus, under the First Amendment, such a law may be upheld only if that law uses the least speech restrictive means to serve what must be a compelling governmental interest. U.S.C.A. Const.Amend. 1. Cutting v. City of Portland, Maine, 802 F.3d 79 (1st Cir. 2015).

Government generally may not enact speech restrictions favoring one message over another. U.S.C.A. Const.Amend. 1. Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015).

A facially content-neutral law does not become content based, for purposes of determining the level of scrutiny under the First Amendment, simply because it may disproportionally affect speech on certain topics. U.S. Const. Amend. 1. Bruni v. City of Pittsburgh, 941 F.3d 73 (3d Cir. 2019).

In any forum, the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker, i.e., viewpoint, is the rationale for the restriction. U.S. Const. Amend. 1. Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 938 F.3d 424 (3d Cir. 2019).

Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination in violation of the First Amendment. U.S. Const. Amend. 1. Robinson v. Hunt County, Texas, 921 F.3d 440 (5th Cir. 2019).

Speaker-based bans are not automatically content based or content neutral, but, rather, because speech restrictions based on the identity of the speaker are all too often simply a means to control content, such laws demand strict scrutiny when the legislature's speaker preference reflects a content preference. U.S. Const. Amend. 1. Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019).

In determining whether a statute regulating speech is content based or content neutral, the plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face. U.S. Const. Amend. 1. Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017).

Statute prohibiting wearing an unauthorized military medal was a content-based restriction of speech, and thus was required to be justified by the substantial showing of need to survive scrutiny under the First Amendment, where the purpose of the statute was to stop the misappropriation or distortion of the particular message of valor conveyed by military medals, and such concerns blossomed only when a person's unauthorized wearing of the medal communicated a false message. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 704(a). U.S. v. Swisher, 811 F.3d 299 (9th Cir. 2016).

Government regulation of expressive activity is content neutral under First Amendment so long as it is justified without reference to the content of the regulated speech. U.S. Const. Amend. 1. Evans v. Sandy City, 944 F.3d 847 (10th Cir. 2019).

Content-based restrictions on speech are subject to the strict scrutiny standard under First Amendment, which requires the government to prove that the restrictions are narrowly tailored to serve a compelling state interest. U.S. Const. Amend. 1. S.B. v. S.S., 243 A.3d 90 (Pa. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).
Iowa—Immaculate Conception Corp. v. Iowa Dept. of Transp., 656 N.W.2d 513, 173 Ed. Law Rep. 997 (Iowa 2003).
N.J.—Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 103 A.3d 249 (2014).
Exemptions
An exemption from otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people; alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select permissible subjects for public debate and thereby to control the search for political truth.
U.S.—City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).
Laws that compel speech

Because mandating speech that a speaker would not otherwise make necessarily alters the content of the speech, laws that compel speech are normally considered content-based regulations of speech and therefore are subject to strict scrutiny under the First Amendment.

U.S.—Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012), on reh'g en banc, 721 F.3d 264, 85 Fed. R. Serv. 3d 1400 (4th Cir. 2013); Tepeyac v. Montgomery County, 5 F. Supp. 3d 745 (D. Md. 2014).

2 U.S.—Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013).

Cal.—Snatchko v. Westfield LLC, 187 Cal. App. 4th 469, 114 Cal. Rptr. 3d 368 (3d Dist. 2010), as modified on denial of reh'g, (Sept. 3, 2010).

Colo.—Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).

N.J.—Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 993 A.2d 805, 256 Ed. Law Rep. 826 (2010).

Test

For purposes of First Amendment analysis, a regulation is not a content-based regulation of speech if (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.

U.S.—Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013).

3 N.C.—State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

Suppression of speech

Although prohibitions foreclosing the entire media may be completely free of content or viewpoint discrimination, the danger they pose to freedom of speech is readily apparent; by eliminating common means of speaking, such measures can suppress too much speech.

U.S.—City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

4 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); U.S. v. Richards, 755 F.3d 269 (5th Cir. 2014), cert. denied, 135 S. Ct. 1546 (2015) and cert. denied, 135 S. Ct. 1547 (2015); Bible Believers v. Wayne County, 765 F.3d 578 (6th Cir. 2014); Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013); Act Now to Stop War and End Racism Coalition v. District of Columbia, 905 F. Supp. 2d 317 (D.D.C. 2012).

Ga.—Goldrush II v. City of Marietta, 267 Ga. 683, 482 S.E.2d 347 (1997).

N.J.—State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 733 A.2d 1159 (1999).

5 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

Regulation aimed at actions entwined with expressive content

U.S.—Comite de Jornaleros de Redondo Beach v. City Of Redondo Beach, 607 F.3d 1178 (9th Cir. 2010), on reh'g en banc, 657 F.3d 936 (9th Cir. 2011).

6 U.S.—Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); Nevada Com'n on Ethics v. Carrigan, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011); U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

Minn.—State v. Melchert-Dinkel, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).

Mo.—State v. Blankenship, 415 S.W.3d 116 (Mo. 2013).

N.Y.—People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).

Disapproval of ideas expressed

The First Amendment prevents the government from proscribing speech and expressive conduct because of the disapproval of the ideas expressed.

U.S.—Snider v. City of Cape Girardeau, 752 F.3d 1149 (8th Cir. 2014).

Rationale for prohibition

The rationale of the general prohibition against content-based regulations of speech is that content discrimination raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.

U.S.—Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

7 U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

Ohio—Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A., 89 Ohio St. 3d 564, 2000-Ohio-488, 733 N.E.2d 1152 (2000).

8 U.S.—Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).
As to commercial speech, generally, see §§ 941 et seq.

9 U.S.—Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).
Such speech is discussed in §§ 951 et seq.

10 U.S.—Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002).

11 U.S.—Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Henrico Professional Firefighters Ass'n Local 1568 v. Board of Sup'rs of Henrico County, 649 F.2d 237 (4th Cir. 1981); Beckerman v. City of Tupelo, Miss., 664 F.2d 502 (5th Cir. 1981).

12 U.S.—American Civil Liberties Union of North Carolina v. Tata, 742 F.3d 563 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3076 (U.S. July 11, 2014).

Government may not discriminate among speakers

U.S.—Surita v. Hyde, 665 F.3d 860 (7th Cir. 2011).

13 U.S.—Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Moss v. U.S. Secret Service, 711 F.3d 941 (9th Cir. 2013).

Ky.—Flying J Travel Plaza v. Com., Transp. Cabinet, Dept. of Highways, 928 S.W.2d 344 (Ky. 1996).

Viewpoint discrimination

(1) "Viewpoint discrimination" is a subset, and a particularly "egregious form," of content discrimination under the First Amendment, and it occurs when the government targets not subject matter, but the particular views taken by speakers on a subject.

U.S.—Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011); Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013).

(2) The First Amendment protects an individual's right to speak freely, a right whose value lies in the fact that it defends equally all viewpoints, even disfavored ones; thus, viewpoint discrimination strikes at the very heart of the First Amendment.

U.S.—Morgan v. Swanson, 659 F.3d 359, 273 Ed. Law Rep. 524 (5th Cir. 2011).

14 Okla.—State ex rel. Oklahoma Bar Ass'n v. Porter, 1988 OK 114, 766 P.2d 958 (Okla. 1988).

15 U.S.—Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994).

16 Ohio—Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A., 89 Ohio St. 3d 564, 2000-Ohio-488, 733 N.E.2d 1152 (2000).

17 U.S.—U.S. v. Alvarez, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012); Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009); Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3770 (U.S. Mar. 23, 2015); Snider v. City of Cape Girardeau, 752 F.3d 1149 (8th Cir. 2014).

Cal.—People v. Chandler, 60 Cal. 4th 508, 176 Cal. Rptr. 3d 548, 332 P.3d 538 (2014).

N.J.—DEG, LLC v. Township of Fairfield, 198 N.J. 242, 966 A.2d 1036 (2009).

N.Y.—People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).

Ohio—Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A., 89 Ohio St. 3d 564, 2000-Ohio-488, 733 N.E.2d 1152 (2000).

Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).

18 U.S.—Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009); Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014); Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013).;

Cal.—Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007).

Nev.—Seres v. Lerner, 120 Nev. 928, 102 P.3d 91 (2004).

N.J.—DEG, LLC v. Township of Fairfield, 198 N.J. 242, 966 A.2d 1036 (2009).

Tex.—Texas Dept. of Transp. v. Barber, 111 S.W.3d 86 (Tex. 2003).

19 U.S.—U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); Showtime Entertainment, LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014); Stilp v. Contino, 613 F.3d 405 (3d Cir. 2010).

Cal.—Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007).

Minn.—State v. Melchert-Dinkel, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).
N.Y.—People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).
Wyo.—Operation Save America v. City of Jackson, 2012 WY 51, 275 P.3d 438 (Wyo. 2012).

Speculation of harm

Mere speculation of harm does not constitute a compelling state interest in the context of applying strict scrutiny to a content-based regulation.
La.—In re Warner, 21 So. 3d 218 (La. 2009).

Indicator of degree to which state's interest is compelling

A clear indicator of the degree to which the state's interest is compelling, as required for a restriction on speech to survive strict scrutiny, is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being "compelling."
U.S.—281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014), cert. denied, 135 S. Ct. 1550 (2015).

20 U.S.—U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).
Cal.—Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007).
Mass.—Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (2005).
Minn.—State v. Melchert-Dinkel, 844 N.W.2d 13, 96 A.L.R.6th 755 (Minn. 2014).
N.Y.—People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).
Pa.—DePaul v. Com., 600 Pa. 573, 969 A.2d 536 (2009).

"Narrowly tailored"

Under strict scrutiny analysis of a restriction on speech, a narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).
U.S.—281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014), cert. denied, 135 S. Ct. 1550 (2015).

21 U.S.—Showtime Entertainment, LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014).
Ga.—McKenzie v. State, 279 Ga. 265, 626 S.E.2d 77 (2005).
Mass.—Bulldog Investors General Partnership v. Secretary of Com., 460 Mass. 647, 953 N.E.2d 691 (2011).
N.Y.—People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).
W. Va.—State ex rel. Loughry v. Tennant, 229 W. Va. 630, 732 S.E.2d 507 (2012).

Government's burden

Under the least-restrictive-means prong of strict scrutiny applicable to a statute that imposes content-based restriction on speech, the burden is on government to prove that proposed alternatives will not be as effective as the challenged statute.
U.S.—American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008).

22 U.S.—U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); Jornaleros de Las Palmas v. City of League City, 945 F. Supp. 2d 779 (S.D. Tex. 2013).

Existence of content-neutral alternatives

The existence of adequate content-neutral alternatives undercuts significantly any defense of a content-based regulation of speech under the First Amendment.
U.S.—Hoye v. City of Oakland, 653 F.3d 835 (9th Cir. 2011).

23 U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

24 Cal.—San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 179 Cal. Rptr. 772, 638 P.2d 655 (1982).

25 U.S.—Aebisher v. Ryan, 622 F.2d 651 (2d Cir. 1980).

26 U.S.—Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

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§ 957. Time, place, and manner restrictions on free speech

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A.L.R. Library

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction, 71 A.L.R.6th 471.

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum, 70 A.L.R.6th 513.

Validity, Construction, and Application of State Statutes and Municipal Ordinances or Orders Providing Buffer Zones Around Health Care Facilities That Offer Abortion Services, 62 A.L.R.6th 359.

The time, place, and manner of protected speech may be reasonably restricted.

While the content of communication enjoys virtually absolute First Amendment protection, the manner of communication does not.[1] The fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views whenever and however and wherever they please.[2] Protected speech is subject to reasonable restrictions on the time, place, and manner in which it is made.[3]

Valid time, place, and manner regulations must not be based on the content or subject matter of the speech.[4] If the restriction is content neutral, or is within the constitutional power of the government,[5] it is subject to an intermediate level of scrutiny.[6] Under this standard, the state must demonstrate that the restriction furthers an important,[7] significant,[8] or substantial[9] government interest; that the interest is unrelated to the suppression of speech;[10] and that the restriction is not substantially[11] broader than necessary to further the important governmental interest[12] or that ample alternative methods of communicating the message have been left open.[13] The failure to satisfy any prong of the intermediate scrutiny test applicable to as-applied First Amendment challenges invalidates a content-neutral regulation.[14]

Although time, place, and manner restrictions on First Amendment speech must be narrowly tailored, the restrictions need not be the least restrictive or least intrusive means of serving the government's interest.[15] It is immaterial that government's interest might be adequately served by some less speech-restrictive alternative,[16] and a content-neutral regulation is not invalid simply because there is some imaginable alternative that might be less burdensome on speech.[17]

The State has the burden of proving that the legislation is substantially related to an important government interest,[18] and the government's position must be supported by substantial evidence.[19] A time, place, and manner regulation on First Amendment speech must contain adequate standards to guide the official's decision and render it subject to effective judicial review.[20]

CUMULATIVE SUPPLEMENT

Cases:

In order to survive intermediate scrutiny under the First Amendment, a law that imposes a burden on speech must be narrowly tailored to serve a significant governmental interest; in other words, the law must not burden substantially more speech than is necessary to further the government's legitimate interests. U.S.C.A. Const.Amend. 1. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

Provision of Maine Civil Rights Act (MCRA), which barred a person from making noise that can be heard within a building when such noise was made intentionally, following order from law enforcement to cease making it, and with additional intent either to jeopardize the health of persons receiving health services within the building, or to interfere with safe and effective delivery of those services within the building, was narrowly tailored to serve state's significant interest in protecting safe and effective provision and receipt of health services, and thus provision would survive intermediate scrutiny on abortion protester's free speech challenge as long as it left open ample alternative channels for communication of the information; provision prohibited only noises that could be heard within a health services building and were made with intent to interfere with health services. U.S. Const. Amend. 1; 5 Me. Rev. Stat. § 4684-B(2). March v. Mills, 867 F.3d 46 (1st Cir. 2017).

Provision of Maine Civil Rights Act (MCRA), which barred a person from making noise that can be heard within a building when such noise was made intentionally, following order from law enforcement to cease making it, and with additional intent either to jeopardize the health of persons receiving health services within the building, or to interfere with safe and effective delivery

of those services within the building, was narrowly tailored to serve state's significant interest in protecting safe and effective provision and receipt of health services, and thus provision would survive intermediate scrutiny on abortion protester's free speech challenge as long as it left open ample alternative channels for communication of the information; provision prohibited only noises that could be heard within a health services building and were made with intent to interfere with health services. U.S. Const. Amend. 1; 5 Me. Rev. Stat. § 4684-B(2). March v. Mills, 867 F.3d 46 (1st Cir. 2017).

In the First Amendment context, fit matters, and even under exacting scrutiny, a commitment to free speech requires governments to employ not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective. U.S. Const. Amend. 1. Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

Nebraska's Funeral Picketing Law (NFPL), limiting when and where picketing and other protest activities may occur in relation to a funeral or burial service, was content neutral, such that intermediate scrutiny, rather than exacting scrutiny, would be applied in deciding facial First Amendment challenge to its constitutionality; a person could be prosecuted under the statute for disrupting or attempting to disrupt a funeral or burial service with speech concerning any topic or viewpoint, asserted purpose for the statute, namely, the protection of citizens from disruption during a funeral or burial service, was unrelated to the content of the regulated speech. U.S. Const. Amend. 1; Neb. Rev. Stat. § 28-1320.01. Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017).

In determining whether regulation of speech is narrowly tailored, as required for a reasonable time, place, and manner restriction on speech, an ordinance's expansive language can signal that the municipality has burdened substantially more speech than effectively advances its goals. U.S. Const. Amend. 1; Cal. Const. art 1, § 2(a). Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—CBS, Inc. v. Lieberman, 439 F. Supp. 862 (N.D. Ill. 1976).
D.C.—Bergman v. District of Columbia, 986 A.2d 1208 (D.C. 2010).

2 U.S.—Wood v. Moss, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); Pine v. City of West Palm Beach, FL, 762 F.3d 1262 (11th Cir. 2014); Wandering Dago Inc. v. New York State Office of General Services, 992 F. Supp. 2d 102 (N.D. N.Y. 2014).
N.H.—State v. Biondolillo, 164 N.H. 370, 55 A.3d 1034 (2012).
Ohio—Cleveland v. McCardle, 139 Ohio St. 3d 414, 2014-Ohio-2140, 12 N.E.3d 1169 (2014).

3 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009); In re Kendall, 58 V.I. 718, 712 F.3d 814 (3d Cir. 2013); Bible Believers v. Wayne County, 765 F.3d 578 (6th Cir. 2014).
Colo.—Curious Theatre Co. v. Colorado Dept. of Public Health and Environment, 220 P.3d 544 (Colo. 2009).
N.H.—State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014).
Ohio—Cleveland v. McCardle, 139 Ohio St. 3d 414, 2014-Ohio-2140, 12 N.E.3d 1169 (2014).
Reasonableness
The reasonableness of a time, place, or manner restriction will be viewed, for First Amendment purposes, in light of less drastic means for achieving the same basic purpose.
U.S.—Service Employees Intern. Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010).
Close and substantial relation to asserted governmental interests required
Where a restriction on speech lacks a close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place, or manner restriction.
U.S.—Price v. City of Fayetteville, N.C., 22 F. Supp. 3d 551 (E.D. N.C. 2014).

Noise

Speech may be proscribed based upon a noncontent element, such as noise.

Idaho—State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

4 U.S.—Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981); Surita v. Hyde, 665 F.3d 860 (7th Cir. 2011); Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).

Ill.—People v. Jones, 188 Ill. 2d 352, 242 Ill. Dec. 267, 721 N.E.2d 546 (1999).

La.—In re Warner, 21 So. 3d 218 (La. 2009).

N.J.—Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 993 A.2d 805, 256 Ed. Law Rep. 826 (2010).

Camping in parks

A National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment though applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless.

U.S.—Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

News racks

A municipality's order that news racks containing "commercial handbills" be removed from the city streets did not constitute a reasonable time, place, or manner restriction on protected speech; the order was not content-neutral as it did not apply to news racks containing "newspapers."

U.S.—City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

5 U.S.—Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).

Me.—City of Bangor v. Diva's, Inc., 2003 ME 51, 830 A.2d 898 (Me. 2003).

Ill.—City of Chicago v. Pooh Bah Enterprises, Inc., 224 Ill. 2d 390, 309 Ill. Dec. 770, 865 N.E.2d 133 (2006).

Mass.—Com. v. Ora, 451 Mass. 125, 883 N.E.2d 1217 (2008).

Pa.—Office Of Disciplinary Counsel v. Marcone, 579 Pa. 1, 855 A.2d 654 (2004).

6 U.S.—Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997); Showtime Entertainment, LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014).

Fla.—North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003).

Ga.—I.D.K., Inc. v. Ferdinand, 277 Ga. 548, 592 S.E.2d 673 (2004).

N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

S.C.—Disabato v. South Carolina Ass'n of School Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (2013).

7 U.S.—Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997); McTernan v. City of York, PA, 564 F.3d 636 (3d Cir. 2009); Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937 (7th Cir. 2015).

Ga.—Great American Dream, Inc. v. DeKalb County, 290 Ga. 749, 727 S.E.2d 667 (2012).

Mass.—Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (2005).

Pa.—Office Of Disciplinary Counsel v. Marcone, 579 Pa. 1, 855 A.2d 654 (2004).

Government interest does not dictate result of analysis

While an extremely important government interest does not dictate the result in time, place, and manner cases, the significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis, which specifically analyzes whether the restriction is narrowly tailored to serve a significant governmental interest.

U.S.—Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007).

Examples

Reduction of criminal activity and prevention of the deterioration of neighborhoods are important government interests under free expression analysis.

Ga.—Goldrush II v. City of Marietta, 267 Ga. 683, 482 S.E.2d 347 (1997).

8 U.S.—Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).

La.—In re Warner, 21 So. 3d 218 (La. 2009).

N.H.—State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014).

N.J.—Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 993 A.2d 805, 256 Ed. Law Rep. 826 (2010).

N.M.—Village of Ruidoso v. Warner, 2012-NMCA-035, 274 P.3d 791 (N.M. Ct. App. 2012).

Genuine nexus required

To justify a content-neutral restriction on the time, place, and manner of protected speech in a public forum, it is not enough for the government to recite an interest that is significant in the abstract; there must be a genuine nexus between the regulation and the interest it seeks to serve.

U.S.—Johnson v. Minneapolis Park and Recreation Bd., 729 F.3d 1094 (8th Cir. 2013).

9 U.S.—Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937 (7th Cir. 2015); National Ass'n for the Advancement of Multijurisdiction Practice v. Berch, 773 F.3d 1037 (9th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3764 (U.S. Mar. 19, 2015); Doe v. City of Albuquerque, 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012).

Ariz.—State v. Stummer, 219 Ariz. 137, 194 P.3d 1043 (2008).

Mass.—Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (2005).

Pa.—Office Of Disciplinary Counsel v. Marcone, 579 Pa. 1, 855 A.2d 654 (2004).

Utah—Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).

Showing of compelling interest required under state constitution

Wash.—Collier v. City of Tacoma, 121 Wash. 2d 737, 854 P.2d 1046 (1993).

Reducing crime

Reducing crime is a substantial government interest, for the purpose of justifying the time, place, and manner regulation of speech.

U.S.—City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002).

10 U.S.—Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013).;Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937 (7th Cir. 2015).

Ga.—Great American Dream, Inc. v. DeKalb County, 290 Ga. 749, 727 S.E.2d 667 (2012).

Me.—City of Bangor v. Diva's, Inc., 2003 ME 51, 830 A.2d 898 (Me. 2003).

Mass.—Com. v. Ora, 451 Mass. 125, 883 N.E.2d 1217 (2008).

Pa.—Office Of Disciplinary Counsel v. Marcone, 579 Pa. 1, 855 A.2d 654 (2004).

11 U.S.—Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

Alaska—Stevens v. Matanuska-Susitna Borough, 146 P.3d 3 (Alaska Ct. App. 2006).

D.C.—Farina v. U.S., 622 A.2d 50 (D.C. 1993).

12 U.S.—Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014); Marcavage v. City of New York, 689 F.3d 98 (2d Cir. 2012), cert. denied, 133 S. Ct. 1492, 185 L. Ed. 2d 548 (2013).;Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013); Doe v. Harris, 772 F.3d 563 (9th Cir. 2014).

Alaska—Stevens v. Matanuska-Susitna Borough, 146 P.3d 3 (Alaska Ct. App. 2006).

Ga.—Great American Dream, Inc. v. DeKalb County, 290 Ga. 749, 727 S.E.2d 667 (2012).

Pa.—Office Of Disciplinary Counsel v. Marcone, 579 Pa. 1, 855 A.2d 654 (2004).

Narrow tailoring

(1) A regulation must be narrowly tailored to advance a government interest without at the same time banning or significantly restricting a substantial quantity of speech that does not create the evils the governmental entity seeks to eliminate.

U.S.—Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010), judgment aff'd, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012).

Mass.—Mendoza v. Licensing Board of Fall River, 444 Mass. 188, 827 N.E.2d 180 (2005).

(2) For a content-neutral time, place, or manner regulation of speech to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests, but the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

13 U.S.—McCullen v. Coakley, 571 F.3d 167, 62 A.L.R.6th 739 (1st Cir. 2009); McTernan v. City of York, PA, 564 F.3d 636 (3d Cir. 2009).

Ariz.—State v. Stummer, 219 Ariz. 137, 194 P.3d 1043 (2008).

La.—In re Warner, 21 So. 3d 218 (La. 2009).

N.J.—Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 993 A.2d 805, 256 Ed. Law Rep. 826 (2010).

Alternative channels need not be perfect substitutes

U.S.—Costello v. City of Burlington, 632 F.3d 41 (2d Cir. 2011).

Factors considered

Factors in the "ample alternatives" criterion of reasonable time/place/manner restrictions on speech that comport with the First Amendment are: (1) whether speaker is permitted to reach his or her intended audience; (2) whether the location of the expressive activity in question is part of the expressive message; (3) the opportunity for spontaneity, particularly for political speech; and (4) the cost and convenience of alternatives.

U.S.—Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir. 2009).

Adequacy of alternative

In order to determine whether a time, place, and manner restriction on speech leaves open ample alternative channels for communication in order to not violate the First Amendment, the available alternatives need not be the speaker's first or best choice or provide the same audience or impact for the speech; rather, the relevant inquiry is simply whether the challenged regulation provides avenues for the more general dissemination of a message.

U.S.—Ross v. Early, 746 F.3d 546 (4th Cir. 2014), cert. denied, 135 S. Ct. 183, 190 L. Ed. 2d 129 (2014).

14 U.S.—Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

15 U.S.—Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014); Doe v. Harris, 772 F.3d 563 (9th Cir. 2014); iMatter Utah v. Njord, 774 F.3d 1258 (10th Cir. 2014); Pine v. City of West Palm Beach, FL, 762 F.3d 1262 (11th Cir. 2014).

Alaska—Stevens v. Matanuska-Susitna Borough, 146 P.3d 3 (Alaska Ct. App. 2006).

Cal.—Snatchko v. Westfield LLC, 187 Cal. App. 4th 469, 114 Cal. Rptr. 3d 368 (3d Dist. 2010), as modified on denial of reh'g, (Sept. 3, 2010).

Mass.—In re Opinion of the Justices to the Senate, 430 Mass. 1205, 723 N.E.2d 1 (2000).

16 U.S.—Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); iMatter Utah v. Njord, 774 F.3d 1258 (10th Cir. 2014).

17 U.S.—Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997); Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013).

18 Fla.—North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003).

19 Cal.—Gerawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1, 14 Cal. Rptr. 3d 14, 90 P.3d 1179 (2004).

20 U.S.—Occupy Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013).

N.M.—Village of Ruidoso v. Warner, 2012-NMCA-035, 274 P.3d 791 (N.M. Ct. App. 2012).

End of Document

16B C.J.S. Constitutional Law § 958

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 958. Effect on free speech rights of restrictions on conduct

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1497, 1504, 1509 to 1529, 1559, 1580, 1581, 1725, 1800, 1801, 2185

A restriction which affects speech incidentally is valid unless the interference with communication outweighs the benefit to the interest to be served.

It is a necessary predicate to free speech analysis that the government's action has, in some way, implicated the free exercise of speech.[1] If a statute regulates only conduct which has no arguable expressive component, then the regulation does not impermissibly curtail freedom of speech.[2] Likewise, nonverbal expressive activity can be banned because of the action it entails as long as the ban is unrelated to the ideas it expresses.[3]

The facts that conduct has a communicative element does not make it immune from governmental regulation.[4] The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.[5] However, while regulations of unprotected conduct are still subject to First Amendment scrutiny when they burden protected

expression, they are scrutinized at a lower level since the concerns that prompt strict scrutiny are absent when conduct, rather than speech, is the triggering factor.[6] A regulation or other restriction by government which has as its purpose the prohibition or prevention of some act other than communicative speech, but which affects speech, is valid unless the interference with communication of ideas and information outweighs the benefit to the governmental interest to be served.[7] Even where a law regulates conduct generally, without addressing speech in particular, it nonetheless may effect an incidental regulation of speech that, like direct regulation, is constitutionally permissible if it does not exceed the bounds of the limited, content-neutral time, place, and manner standard.[8] A government regulation of conduct is justified if it is within the power of the government,[9] if it furthers an important or substantial governmental interest,[10] if the interest is unrelated to the suppression of free speech,[11] and if the incidental restriction on freedom of speech is no greater than is necessary to the furtherance of that interest.[12]

Heightened scrutiny is applied to generally applicable statutes only when they regulate conduct that has significant expressive element or when statutes have inevitable effect of singling out those engaged in expressive activity.[13]

CUMULATIVE SUPPLEMENT

Cases:

A speech-restrictive law with widespread impact gives rise to far more serious concerns than could any single supervisory decision, and thus, when such a law is at issue, the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. U.S.C.A. Const.Amend. 1. Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule. U.S.C.A. Const.Amend. 1. National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

Vermont statute restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors was designed to impose a specific, content- and speaker-based restrictions on protected expression, and thus heightened judicial scrutiny was warranted in determining whether it violated First Amendment free speech protections; statute had effect of preventing detailers employed by pharmaceutical manufacturers from using prescriber-identifying information to market manufacturers' brand-name drugs; abrogating *IMS Health Inc. v. Mills, 616 F.3d 7* and *IMS Health Inc. v. Ayotte, 550 F.3d 42*. U.S.C.A. Const.Amend. 1; 18 V.S.A. § 4631(d). Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

[END OF SUPPLEMENT]

Footnotes

1 Conn.—Ramos v. Town of Vernon, 254 Conn. 799, 761 A.2d 705 (2000).

2 Colo.—City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995).
Conn.—Leydon v. Town of Greenwich, 257 Conn. 318, 777 A.2d 552 (2001).
N.M.—Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428 (N.M. Ct. App. 2012), judgment aff'd, 2013-NMSC-040, 309 P.3d 53 (N.M. 2013), cert. denied, 134S. Ct.1787, 188 L. Ed. 2d 757 (2014).

3 Idaho—State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

4 Ga.—State v. Miller, 260 Ga. 669, 398 S.E.2d 547 (1990).

5 U.S.—Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

6 Utah—Bushco v. Utah State Tax Com'n, 2009 UT 73, 225 P.3d 153 (Utah 2009).

7 U.S.—Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).
Kan.—State v. Russell, 227 Kan. 897, 610 P.2d 1122 (1980).
Mass.—Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978).

8 N.H.—State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014).

9 U.S.—Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984); U.S. v. Tebeau, 713 F.3d 955 (8th Cir. 2013), cert. denied, 134 S. Ct. 314, 187 L. Ed. 2d 156 (2013); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

10 U.S.—Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); U.S. v. Tebeau, 713 F.3d 955 (8th Cir. 2013), cert. denied, 134 S. Ct. 314, 187 L. Ed. 2d 156 (2013); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).
Mass.—Com. v. Ora, 451 Mass. 125, 883 N.E.2d 1217 (2008).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

11 U.S.—Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984); U.S. v. Tebeau, 713 F.3d 955 (8th Cir. 2013), cert. denied, 134 S. Ct. 314, 187 L. Ed. 2d 156 (2013); Curves, LLC v. Spalding County, Ga., 685 F.3d 1284, 82 Fed. R. Serv. 3d 1138 (11th Cir. 2012).
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).
Colo.—Curious Theatre Co. v. Colorado Dept. of Public Health and Environment, 220 P.3d 544 (Colo. 2009).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

12 U.S.—Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); U.S. v. Tebeau, 713 F.3d 955 (8th Cir. 2013), cert. denied, 134 S. Ct. 314, 187 L. Ed. 2d 156 (2013); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010).
Ariz.—Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).
Mass.—Com. v. Ora, 451 Mass. 125, 883 N.E.2d 1217 (2008).
N.C.—Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 749 S.E.2d 429 (2012), cert. denied, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013).

13 U.S.—U.S. v. Kaczynski, 551 F.3d 1120 (9th Cir. 2009).

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16B C.J.S. Constitutional Law § 959

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 959. Denial of government benefits as restriction on free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1501

Subject to some qualifications, the denial of valuable government benefits may not be used as a means of restricting free speech.

Government may not restrict free speech by punishing those who engage in protected speech of which it disapproves by denying them valuable government benefits[1] or by making a limitation of free speech a condition of the benefit.[2] This is true even if the person has no independent right to the benefit and even if the government might properly refuse to grant it to him or her for a number of reasons.[3]

The general principle has been applied to membership in the military reserves,[4] aid to education,[5] public housing,[6] state bar membership,[7] and legislation prohibiting the use of funds for specified purposes.[8] However, the principle does not apply where the denial of a benefit is for conduct other than protected speech,[9] where a person is refused continued participation in a program

because his or her speech has been disruptive of the program itself,[10] or where there is a denial of a privilege which does not limit the right to speak.[11]

CUMULATIVE SUPPLEMENT

Cases:

The liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. U.S.C.A. Const.Amend. 1. Trinity Lutheran Church of Columbia, Inc. v. Comer, 2017 WL 2722410 (U.S. 2017).

The Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit, but at the same time, the Government is not required to subsidize activities that it does not wish to promote. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1. Matal v. Tam, 137 S. Ct. 1744 (2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).
Ill.—Schlicher v. Board of Fire and Police Com'rs of Village of Westmont, 363 Ill. App. 3d 869, 300 Ill. Dec. 634, 845 N.E.2d 55 (2d Dist. 2006).
Utah—Doyle v. Lehi City, 2012 UT App 342, 291 P.3d 853 (Utah Ct. App. 2012).
"Unconstitutional conditions doctrine"
Under the modern "unconstitutional conditions doctrine," the government may not deny a benefit to a person on a basis that infringes his or her constitutionally protected freedom of speech even if he or she has no entitlement to that benefit.
U.S.—Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006); Planned Parenthood of Kansas and Mid-Missouri v. Moser, 747 F.3d 814 (10th Cir. 2014).
Inquiry about beliefs
Pursuant to the First Amendment, a state may not inquire about a person's views or associations solely for the purpose of withholding a right or benefit because of what he or she believes.
U.S.—Newman v. Beard, 617 F.3d 775 (3d Cir. 2010).

2 U.S.—Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982).
N.J.—State v. Thomas, 111 N.J. Super. 42, 266 A.2d 614 (Law Div. 1970).
"Unconstitutional conditions doctrine"
The unconstitutional conditions doctrine acknowledges that the government, having no obligation to furnish a benefit, nevertheless cannot force a citizen to choose between a benefit and free speech.
U.S.—Planned Parenthood Ass'n of Hidalgo County Texas, Inc. v. Suehs, 692 F.3d 343 (5th Cir. 2012).
Compelling speech
Compelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment.
U.S.—Alliance for Open Society Intern., Inc. v. U.S. Agency for Intern. Development, 651 F.3d 218 (2d Cir. 2011), cert. granted, 133 S. Ct. 928, 184 L. Ed. 2d 719 (2013) and aff'd, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

3 U.S.—Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Planned Parenthood of Kansas and Mid-Missouri v. Moser, 747 F.3d 814 (10th Cir. 2014).

4 U.S.—benShalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980).

5 **Sexual relations between unmarried persons**

A proviso in an appropriations bill prohibiting state aid to a postsecondary institution which assists any organization recommending or advocating sexual relations between persons not married to each other violated the constitutional guaranty of freedom of speech.

Fla.—Department of Educ. v. Lewis, 416 So. 2d 455, 5 Ed. Law Rep. 681 (Fla. 1982).

6 N.Y.—Grayson v. Christian, 64 A.D.2d 887, 407 N.Y.S.2d 896 (2d Dep't 1978).

7 R.I.—In re Roots, 762 A.2d 1161 (R.I. 2000).

8 **Persons providing information as to abortions**

A statute providing that no government funds shall be used as family planning funds by any person or agency which performs, refers, or encourages abortion is unconstitutional insofar as it denies funds to persons and organization who encourage abortions.

U.S.—Valley Family Planning v. State of N.D., 489 F. Supp. 238 (D.N.D. 1980), judgment aff'd, 661 F.2d 99 (8th Cir. 1981).

9 U.S.—Bogan v. New London Housing Authority, 366 F. Supp. 861 (D. Conn. 1973).

Obscene remark to supervisor

Denial of unemployment compensation for the misconduct of making an obscene remark to her supervisor did not constitute an unlawful abridgement of an employee's constitutionally protected right of free speech.

Mo.—Acord v. Labor and Indus. Relations Commission, 607 S.W.2d 174 (Mo. Ct. App. S.D. 1980).

10 **Witness protection program**

U.S.—Garcia v. U.S., 666 F.2d 960 (5th Cir. 1982).

11 U.S.—Advocates for Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976).

U.S.—In re McGinley, 660 F.2d 481 (C.C.P.A. 1981).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 960. Protection of listeners

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1491, 1509 to 1529, 1555, 1557, 1559, 1564, 1580, 1581, 1725, 1800, 2185

Protection of recipients of speech may be a valid basis for a restriction on the speech.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[1] Thus, although the government may protect individual privacy by enacting reasonable time, place, and manner restrictions which apply to all speech irrespective of its content,[2] where the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, its power is strictly limited by the guaranty of freedom of speech.[3] The government may not suppress the dissemination of truthful information about lawful activity because of fear of the effect of the information upon its disseminators and its recipients[4] or because society finds the expressed idea offensive or disagreeable.[5] In most circumstances, the First Amendment does not permit the government to decide which types of otherwise protected speech

are sufficiently offensive to require protection for the unwilling listener or viewer;[6] rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his or her eyes.[7]

Where a single speaker communicates to many listeners, the guaranty of free speech and press does not permit the government to prohibit speech as intrusive unless the audience is captive in the sense that it cannot avoid the objectionable speech.[8] Where a member of the audience is free to look away, stop reading, or stop listening, a restriction of speech or press cannot ordinarily be justified by an interest in protecting viewers, readers, or listeners.[9] Conversely, where the members of the audience may be viewed as captives, unable to easily ignore speech, government restrictions to protect them are valid.[10]

On the other hand, freedom of speech must recognize, at least within limits, a freedom not to listen[11] so that there is room for government to protect targeted listeners from offensive speech[12] even in places outside their homes.[13] The validity of restrictions designed to protect the audience depends on the balance between their right to privacy and the right of the speaker[14] considered in connection with the circumstances of the particular case.[15] The ability of the government to shut off discourse solely to protect others from hearing it depends on a showing that substantial privacy interests are being invaded in an essentially intolerable manner.[16]

The extent of the application of freedom of speech may take into consideration the age or maturity of those to whom it is addressed.[17] Government can adopt more stringent controls on communication materials available to youths than on those available to adults.[18] However, speech which is not obscene nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that government thinks unsuitable for them.[19]

CUMULATIVE SUPPLEMENT

Cases:

In most circumstances, the First Amendment does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer; rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

The ability of government, consonant with the First Amendment, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

2 § 957.

3 U.S.—Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

4 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

5 U.S.—Novotny v. Tripp County, S.D., 664 F.3d 1173 (8th Cir. 2011).
Ill.—People v. Sanders, 182 Ill. 2d 524, 231 Ill. Dec. 573, 696 N.E.2d 1144 (1998).

6 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

7 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Phelps-Roper v. City of Manchester, Mo., 697 F.3d 678 (8th Cir. 2012).

8 U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

9 U.S.—Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).
Or.—State v. Cardwell, 22 Or. App. 242, 539 P.2d 169 (1975).
Bill insert
A commission's order prohibiting the inclusion by public utility companies in monthly bills of inserts discussing controversial issues of public policy could not be justified as necessary to avoid forcing a utility's views on a captive audience since customers may escape exposure to objectionable material simply by throwing the insert into a waste basket.
U.S.—Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

10 Or.—State v. Cardwell, 22 Or. App. 242, 539 P.2d 169 (1975).
Art exhibit in state university corridor
U.S.—Close v. Lederle, 424 F.2d 988 (1st Cir. 1970).
Narrow circumstances
Only in narrow circumstances may the government restrain speech to protect captive audiences.
U.S.—Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009).
Degree of captivity
Unwanted speech may be regulated where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure; such areas include the home and its immediate surroundings, medical facilities, and routes to and from work.
Mo.—State v. Vaughn, 366 S.W.3d 513 (Mo. 2012).

11 U.S.—Close v. Lederle, 424 F.2d 988 (1st Cir. 1970).

12 U.S.—Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

13 U.S.—Reeves v. McConn, 638 F.2d 762 (5th Cir. 1981).
Balance between offensive speaker and unwilling audience
In determining whether otherwise protected speech is punishable under the captive audience doctrine, outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away.
Mont.—State v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755 (2013), cert. denied, 134 S. Ct. 220, 187 L. Ed. 2d 143 (2013).

14 U.S.—Weiss v. Patrick, 453 F. Supp. 717 (D.R.I. 1978), aff'd, 588 F.2d 818 (1st Cir. 1978).

15 U.S.—Rowan v. U.S. Post Office Dept., 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

16 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Government of Virgin Islands v. Vanterpool, 767 F.3d 157 (3d Cir. 2014); Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009).
Mo.—State v. Vaughn, 366 S.W.3d 513 (Mo. 2012).
Mont.—State v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755 (2013), cert. denied, 134 S. Ct. 220, 187 L. Ed. 2d 143 (2013).

17 U.S.—Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977).

18 U.S.—Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).
Pornography
U.S.—Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982).

19 U.S.—Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 961. Vagueness doctrine applicable to free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1496, 1505, 1520 to 1524

A vague restriction which affects protected speech or press activity is generally void as a violation of the guaranty of freedom of speech and press.

The traditional standard of vagueness, which inquires whether the terms of a regulation are so indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application, is applied strictly to restrictions of free speech or free press[1] because of the particular value which our society places on the free dissemination of ideas.[2] Under the "void-for-vagueness" doctrine, a statute or other restriction is unconstitutional if it burdens speech in terms so vague that they might include protected speech or leave an individual without clear guidance as to what kind of speech can be punished.[3]

To avoid chilling the exercise of First Amendment rights, any restriction of expression must be expressed in terms which clearly inform citizens of prohibited conduct and in terms susceptible of objective measurement.[4] Restrictions which prohibit or regulate speech must be sufficiently precise that persons may have notice of what is prohibited[5] and to limit the discretion of the

agency charged with enforcement and prevent arbitrary and discriminatory application in particular cases.[6] A reasonably precise ascertainable standard is also necessary in order that the restrictions may not have a chilling effect on speech in that persons may be deterred from protected speech which might appear to be within the restriction.[7] However, even under the heightened standard for the First Amendment, the potential chilling effect on protected expression must be both real and substantial to invalidate a statute as void for vagueness in a facial challenge.[8]

CUMULATIVE SUPPLEMENT

Cases:

Non-expressive, physically harassing conduct is entirely outside the ambit of the Free Speech Clause. U.S.C.A. Const.Amend. 1. Wollschlaeger v. Governor of Florida, 797 F.3d 859 (11th Cir. 2015).

Law that implicates First Amendment's freedom of speech requires greater specificity than statute's ability to provide fair notice of prohibited conduct, in order to avoid chilling protected expression; specificity and clarity in statute are important to prevent citizens from steering far wider of unlawful zone than if boundaries of forbidden areas are clearly marked, and gives law enforcement minimal guidelines to prevent standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections. U.S. Const. Amend. 1. Ex parte Barton, 586 S.W.3d 573 (Tex. App. Fort Worth 2019), petition for discretionary review granted, (Nov. 20, 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).
Cal.—People v. Fogelson, 21 Cal. 3d 158, 145 Cal. Rptr. 542, 577 P.2d 677 (1978).
Ga.—City of Macon v. Smith, 244 Ga. 157, 259 S.E.2d 90 (1979).
Haw.—State v. Bloss, 64 Haw. 148, 637 P.2d 1117 (1981).
W. Va.—Garcelon v. Rutledge, 173 W. Va. 572, 318 S.E.2d 622 (1984).

2 U.S.—Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980).

3 Ill.—Ardt v. Illinois Dept. of Professional Regulation, 154 Ill. 2d 138, 180 Ill. Dec. 713, 607 N.E.2d 1226 (1992).
Wis.—County of Kenosha v. C & S Management, Inc., 223 Wis. 2d 373, 588 N.W.2d 236 (1999).
Restraining order
U.S.—U.S. v. Brown, 218 F.3d 415 (5th Cir. 2000).

4 Utah—I.M.L. v. State, 2002 UT 110, 61 P.3d 1038 (Utah 2002).

5 U.S.—F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).
Ala.—Dowling v. Alabama State Bar, 539 So. 2d 149 (Ala. 1988).
Alaska—R.R. v. State, 919 P.2d 754 (Alaska 1996).
Wis.—City of Madison v. Baumann, 162 Wis. 2d 660, 470 N.W.2d 296 (1991).
Purpose to enable informed decision-making
Colo.—Dallman v. Ritter, 225 P.3d 610 (Colo. 2010).
The greater the burden, the greater the need for clarity and precision
The Free Speech Clause vagueness and overbreadth calculus must be calibrated to the kind and degree of burdens imposed on those who must comply with the regulatory scheme, and the greater the burden on the regulated class, the more acute the need for clarity and precision.
U.S.—Wisconsin Right To Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014).

6 U.S.—F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012); National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).
Alaska—R.J.M. v. State, Dept. of Health and Social Services, 973 P.2d 79 (Alaska 1999).
Pa.—Widoff v. Disciplinary Bd. of Supreme Court of Pennsylvania, 54 Pa. Commw. 124, 420 A.2d 41 (1980), order aff'd, 494 Pa. 129, 430 A.2d 1151 (1981).

Unbridled discretion

Restrictions on the right to free speech or assembly must not be so vague as to afford unbridled discretion to the government authority seeking to abridge those rights.
Idaho—Watters v. Otter, 981 F. Supp. 2d 912 (D. Idaho 2013).

7 U.S.—Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).
Ala.—Dowling v. Alabama State Bar, 539 So. 2d 149 (Ala. 1988).
Alaska—R.R. v. State, 919 P.2d 754 (Alaska 1996).
Tenn.—City of Knoxville v. Entertainment Resources, LLC, 166 S.W.3d 650 (Tenn. 2005).

Due process concerns

Even when speech is not at issue, void for vagueness doctrine addresses at least two connected but discrete due process concerns: (1) that regulated parties should know what is required of them so they may act accordingly, and (2) precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way; when speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.
U.S.—F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).

8 U.S.—Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 962. Overbreadth doctrine applicable to free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1124, 1490, 1496, 1505, 1520 to 1524

Restrictions intended to control unprotected speech are unconstitutionally overbroad if they also embrace protected speech or press activity.

Restrictions intended to prohibit or control acts which are not protected speech must also avoid overbreadth, which occurs when the restriction appears to embrace both protected and unprotected speech or press activity.[1] The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[2] The overbreadth doctrine reflects the conclusion that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.[3] A statute is facially overbroad, and therefore constitutionally intolerable, if it may cause others not before the court to refrain from constitutionally protected speech or expression[4] or allows for selective enforcement.[5]

Overbroad restrictions touching speech are particularly repugnant when they carry criminal sanctions.[6] If a statute criminalizes a substantial amount of constitutionally protected speech, it is unconstitutionally overbroad even if it has some legitimate application.[7]

A statute or regulation may be challenged as overbroad even though the challenger isnot affected by the part of it which is applicable to protected speech if it will significantly compromise the First Amendment rights of parties not before the court.[8]

A statute or regulation should not be held void as overbroad on its face unless the overbreadth is not only real,[9] but also substantial,[10] both in an absolute sense[11] and when judged in relation to the plainly legitimate sweep of the statute or regulation.[12] Even if there are marginal applications in which a statute would infringe on First Amendment free speech values, facial invalidation because of overbreadth is inappropriate if the remainder of the statute covers easily identifiable and constitutionally proscribable conduct.[13]

If a statute may be partially invalidated[14] or fairly construed in a manner which limits its application to a core of unprotected expression and avoids interference with protected speech, it may be upheld against the charge that it is overly broad.[15] Enforcement of an overbroad statute or regulation is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.[16] Even if a statute has only an incidental impact on constitutionally protected free speech, the statute must be narrowly interpreted so that its effect on First Amendment freedoms is no greater than is essential to serve a substantial governmental interest.[17]

The standard of scrutiny for overbreadth is very high,[18] and speech will be protected unless it is shown likely to produce a clear and present danger of a serious substantive evil.[19] When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.[20]

The overbreadth doctrine is considered one of last resort and should be used sparingly,[21] especially where the statute in question is primarily meant to regulate conduct and not merely pure speech.[22] The doctrine's concern with chilling protected speech attenuates as protected behavior moves from pure speech toward conduct,[23] and rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech, such as picketing or demonstrating.[24]

CUMULATIVE SUPPLEMENT

Cases:

First Amendment overbreadth doctrine permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute; the doctrine responds to the concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech, especially when the overbroad statute imposes criminal sanctions. U.S.C.A. Const.Amend. 1. Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015).

First Amendment overbreadth doctrine permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute; the doctrine responds to the concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected

speech, especially when the overbroad statute imposes criminal sanctions. U.S.C.A. Const.Amend. 1. Expressions Hair Design v. Schneiderman, 803 F.3d 94 (2d Cir. 2015).

The constitutionality of a statute under the First Amendment's overbreadth doctrine does not depend on how much protected expression it does not, but could, ban, but rather on whether it bans too much protected expression in relation to its legitimate sweep. U.S. Const. Amend. 1. State v. Hensel, 901 N.W.2d 166 (Minn. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
Ark.—Shoemaker v. State, 343 Ark. 727, 38 S.W.3d 350, 152 Ed. Law Rep. 364 (2001).
Md.—Todd v. State, 161 Md. App. 332, 868 A.2d 944 (2005).
Neb.—State v. Rabourn, 269 Neb. 499, 693 N.W.2d 291 (2005).

2 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002); Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011); U.S. v. Scruggs, 714 F.3d 258 (5th Cir. 2013), cert. denied, 134 S. Ct. 336, 187 L. Ed. 2d 158 (2013); U.S. v. Martinez, 736 F.3d 981 (11th Cir. 2013).
Fla.—City of West Palm Beach v. Chatman, 112 So. 3d 723 (Fla. 4th DCA 2013).
Mass.—Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 977 N.E.2d 524 (2012).
Neb.—State v. Scott, 284 Neb. 703, 824 N.W.2d 668 (2012).
N.Y.—People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).
Purpose of doctrine
The overbreadth doctrine exists out of concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech, especially when the overbroad statute imposes criminal sanctions.
U.S.—J.L. Spoons, Inc. v. Dragani, 538 F.3d 379 (6th Cir. 2008); Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011).
N.H.—State v. Gubitosi, 157 N.H. 720, 958 A.2d 962 (2008).

3 Ill.—People v. Melongo, 2014 IL 114852, 379 Ill. Dec. 43, 6 N.E.3d 120 (Ill. 2014).

4 U.S.—J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).
Cal.—People v. Stanistreet, 29 Cal. 4th 497, 127 Cal. Rptr. 2d 633, 58 P.3d 465 (2002).
Ky.—Varble v. Com., 125 S.W.3d 246 (Ky. 2004).

5 Wis.—Lounge Management, Ltd. v. Town of Trenton, 219 Wis. 2d 13, 580 N.W.2d 156 (1998).

6 S.D.—State v. Hauge, 1996 SD 48, 547 N.W.2d 173 (S.D. 1996).

7 Wash.—State v. Kilburn, 151 Wash. 2d 36, 84 P.3d 1215 (2004), as amended, (Feb. 17, 2004).

8 U.S.—New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); Free Speech Coalition, Inc. v. Attorney General of U.S., 677 F.3d 519 (3d Cir. 2012); National Federation of the Blind of Texas, Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011).
Md.—McCree v. State, 441 Md. 4, 105 A.3d 456 (2014).
Mass.—Bulldog Investors General Partnership v. Secretary of Com., 460 Mass. 647, 953 N.E.2d 691 (2011).
Neb.—State v. Scott, 284 Neb. 703, 824 N.W.2d 668 (2012).

9 U.S.—Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); Government of Virgin Islands v. Vanterpool, 767 F.3d 157 (3d Cir. 2014); Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013); U.S. v. Brune, 767 F.3d 1009 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015).
Utah—State v. Morrison, 2001 UT 73, 31 P.3d 547 (Utah 2001).
S.D.—State v. Martin, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).

Tex.—Celis v. State, 354 S.W.3d 7 (Tex. App. Corpus Christi 2011), petition for discretionary review granted, (Feb. 1, 2012) and judgment aff'd, 416 S.W.3d 419 (Tex. Crim. App. 2013).

Where conduct is involved

U.S.—Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011).

10 U.S.—Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002); Government of Virgin Islands v. Vanterpool, 767 F.3d 157 (3d Cir. 2014); Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013); U.S. v. Brune, 767 F.3d 1009 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015).

Ill.—People v. Farmer, 2011 IL App (1st) 83185, 350 Ill. Dec. 978, 949 N.E.2d 770 (App. Ct. 1st Dist. 2011).

Neb.—State v. Hookstra, 263 Neb. 116, 638 N.W.2d 829 (2002).

Tex.—Celis v. State, 354 S.W.3d 7 (Tex. App. Corpus Christi 2011), petition for discretionary review granted, (Feb. 1, 2012) and judgment aff'd, 416 S.W.3d 419 (Tex. Crim. App. 2013).

Wis.—State v. Stevenson, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90 (2000).

Where conduct is involved

U.S.—Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011).

N.Y.—People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).

11 U.S.—U.S. v. Stagliano, 693 F. Supp. 2d 25 (D.D.C. 2010).

Idaho—State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

Ill.—People v. Farmer, 2011 IL App (1st) 83185, 350 Ill. Dec. 978, 949 N.E.2d 770 (App. Ct. 1st Dist. 2011).

S.D.—State v. Asmussen, 2003 SD 102, 668 N.W.2d 725 (S.D. 2003).

12 U.S.—Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003); Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013); U.S. v. Brune, 767 F.3d 1009 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015).

Idaho—State v. Poe, 139 Idaho 885, 88 P.3d 704 (2004).

Ill.—People v. Farmer, 2011 IL App (1st) 83185, 350 Ill. Dec. 978, 949 N.E.2d 770 (App. Ct. 1st Dist. 2011).

S.C.—In re Amir X.S., 371 S.C. 380, 639 S.E.2d 144, 215 Ed. Law Rep. 1142 (2006).

Va.—Muhammad v. Com., 269 Va. 451, 619 S.E.2d 16 (2005), habeas corpus dismissed, 274 Va. 3, 646 S.E.2d 182 (2007) and habeas corpus dismissed, 2008 WL 4360996 (E.D. Va. 2008), aff'd, 575 F.3d 359 (4th Cir. 2009).

Factors considered by court

When making a determination under the First Amendment Free Speech Clause of whether a substantial number of the applications of a statute are unconstitutional, judged in relation to the statute's plainly legitimate sweep, a court considers: (1) the number of valid applications of the statute; (2) the historic or likely frequency of conceivably impermissible applications; (3) the nature of the activity or conduct sought to be regulated; and (4) the nature of the state interest underlying the regulation.

U.S.—Free Speech Coalition, Inc. v. Attorney General of U.S., 677 F.3d 519 (3d Cir. 2012).

13 D.C—Smith-Caronia v. U.S., 714 A.2d 764 (D.C. 1998).

Nev.—City of Las Vegas v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 122 Nev. 1041, 146 P.3d 240 (2006).

14 U.S.—Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

Colo.—People v. Hickman, 988 P.2d 628 (Colo. 1999).

15 U.S.—Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

Colo.—People v. Hickman, 988 P.2d 628 (Colo. 1999).

Mo.—State v. Moore, 90 S.W.3d 64 (Mo. 2002).

N.Y.—People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).

16 U.S.—U.S. v. Sayer, 748 F.3d 425 (1st Cir. 2014); Snider v. City of Cape Girardeau, 752 F.3d 1149 (8th Cir. 2014); Protect Marriage IL v. Orr, 458 F. Supp. 2d 562 (N.D. Ill. 2006), judgment aff'd, 463 F.3d 604 (7th Cir. 2006); U.S. v. Fumo, 628 F. Supp. 2d 573 (E.D. Pa. 2007).

Colo.—Dallman v. Ritter, 225 P.3d 610 (Colo. 2010).

N.J.—In re Disciplinary Action Against Gonzalez, 405 N.J. Super. 336, 964 A.2d 811 (App. Div. 2009).

S.C.—In re Amir X.S., 371 S.C. 380, 639 S.E.2d 144, 215 Ed. Law Rep. 1142 (2006).

17 Del.—Richardson v. Wile, 535 A.2d 1346 (Del. 1988).

18 Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).

Strict scrutiny

Nev.—Seres v. Lerner, 120 Nev. 928, 102 P.3d 91 (2004).

19 Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).

As to the clear and present danger doctrine, generally, see § 963.

20 U.S.—Five Borough Bicycle Club v. City of New York, 483 F. Supp. 2d 351 (S.D. N.Y. 2007), judgment aff'd, 308 Fed. Appx. 511 (2d Cir. 2009).

N.J.—Matter of Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 155 N.J. 357, 715 A.2d 216 (1998).

21 U.S.—U.S. v. Brune, 767 F.3d 1009 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015); Pence v. City of St. Louis, Mo., 958 F. Supp. 2d 1079 (E.D. Mo. 2013).

Mass.—Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 977 N.E.2d 524 (2012).

S.C.—State v. Bouye, 325 S.C. 260, 484 S.E.2d 461 (1997).

Overbreadth doctrine is strong medicine

N.H.—State v. Hynes, 159 N.H. 187, 978 A.2d 264 (2009).

22 S.C.—State v. Bouye, 325 S.C. 260, 484 S.E.2d 461 (1997).

23 U.S.—Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

Ill.—City of Chicago v. Pooh Bah Enterprises, Inc., 224 Ill. 2d 390, 309 Ill. Dec. 770, 865 N.E.2d 133 (2006).

N.Y.—People v. Foley, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000).

Pa.—Com. v. Mayfield, 574 Pa. 460, 832 A.2d 418 (2003).

Wash.—State v. Strong, 167 Wash. App. 206, 272 P.3d 281 (Div. 3 2012).

24 U.S.—Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 963. Clear and present danger doctrine applicable to free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1491, 1494, 1497, 1504, 1509 to 1529, 1555, 1558, 1559, 1562, 1800, 1801

Under the clear and present danger doctrine, restrictions on the right of free speech and free press may be imposed when, and only when, necessary to prevent grave and immediate danger to interests which the government may lawfully protect.

The "clear and present danger" doctrine[1] serves as a guide in determining the constitutionality of governmental restrictions on the right of free speech and free press.[2] Under the doctrine, freedom of speech and of press is susceptible of restriction when,[3] and only when,[4] necessary to prevent grave and immediate danger to interests which the government may lawfully protect.

Fear of serious injury cannot alone justify the suppression of free speech.[5] The important question is not whether the speech which a statute purports to regulate is offensive or inflammatory[6] but rather whether the speech is likely to produce imminent lawless action.[7]

Any attempt to restrict free speech must be justified by clear public interest, threatened not doubtfully or remotely, or even probably, but by clear and present danger,[8] and the danger must have existed at the time the acts complained of were committed.[9] There must be reasonable ground to fear that serious evil will result if free speech is practiced and to believe that the danger apprehended is imminent.[10]

Mere public inconvenience, annoyance, or unrest is not sufficient to warrant restrictions on the right of free speech.[11] In determining whether there is a clear and present danger justifying limitation on free speech, the court must inquire in each case whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[12] Where the effect of a statute or ordinance on the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, a rigid test requiring a showing of imminent danger to the security of the nation will not be applied.[13]

Under the clear and present danger test, speech which advocates violation of law is protected except where it is directed to inciting or producing imminent lawless action and is likely to produce it.[14]

The clear and present danger test is not applied to determine the constitutionality of police regulations in interstate commerce,[15] and the doctrine is not available to justify a prior restraint of speech or press.[16]

Footnotes

1 U.S.—Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

2 U.S.—Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).
Ohio—Seven Hills v. Aryan Nations, 76 Ohio St. 3d 304, 1996-Ohio-394, 667 N.E.2d 942 (1996).
Wash.—State v. Pauling, 149 Wash. 2d 381, 69 P.3d 331 (2003).

3 U.S.—Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).
Ga.—State v. Shepherd Const. Co., Inc., 248 Ga. 1, 281 S.E.2d 151 (1981).
Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).

4 U.S.—West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).
Colo.—People v. Vaughan, 183 Colo. 40, 514 P.2d 1318 (1973).
N.J.—Matter of Hinds, 90 N.J. 604, 449 A.2d 483 (1982).

5 U.S.—U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995).

6 Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).

7 Ohio—Seven Hills v. Aryan Nations, 76 Ohio St. 3d 304, 1996-Ohio-394, 667 N.E.2d 942 (1996).
Wash.—State v. Williams, 144 Wash. 2d 197, 26 P.3d 890 (2001).

8 U.S.—Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).
Fla.—Lieberman v. Marshall, 236 So. 2d 120 (Fla. 1970).
Me.—State v. John W., 418 A.2d 1097, 14 A.L.R.4th 1238 (Me. 1980).
Mere speculation insufficient
Mere speculation about danger is not an adequate basis on which to justify restriction of speech.
U.S.—Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011).
Immediate threat to public safety, peace, or order
Government officials may stop or disperse public demonstrations or protests, without violating First Amendment rights of freedom of speech and assembly, where clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears.
U.S.—Jones v. Parmley, 465 F.3d 46 (2d Cir. 2006).

9 U.S.—U.S. v. Korner, 56 F. Supp. 242 (S.D. Cal. 1944).

10 U.S.—U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995); Whitney v. City of Milan, 677 F.3d 292 (6th Cir. 2012).

11 U.S.—Terminiello v. City of Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); Benson v. Rich, 448 F.2d 1371 (10th Cir. 1971); Galena v. Leone, 711 F. Supp. 2d 440 (W.D. Pa. 2010), aff'd, 638 F.3d 186 (3d Cir. 2011); Congine v. Village of Crivitz, 947 F. Supp. 2d 963 (E.D. Wis. 2013).
Ohio—Seven Hills v. Aryan Nations, 76 Ohio St. 3d 304, 1996-Ohio-394, 667 N.E.2d 942 (1996).
Wash.—State v. Pauling, 149 Wash. 2d 381, 69 P.3d 331 (2003).

12 U.S.—Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).

13 U.S.—American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); Government of Virgin Islands v. Brodhurst, 6 V.I. 509, 285 F. Supp. 831 (D.V.I. 1968).

14 U.S.—Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).
Ga.—State v. Davis, 246 Ga. 761, 272 S.E.2d 721 (1980).
Wash.—Hughes v. Kramer, 82 Wash. 2d 537, 511 P.2d 1344 (1973).
Advocacy of indefinite future action
Words amounting to nothing more than advocacy of illegal action at some indefinite future time do not come within the narrowly limited classes of speech states may punish.
U.S.—Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973).

15 U.S.—Schindler v. U.S., 221 F.2d 743 (9th Cir. 1955).

16 Tex.—Iranian Muslim Organization v. City of San Antonio, 615 S.W.2d 202 (Tex. 1981).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

A. In General

6. Limitations and Restrictions on Right

c. Regulation of Speech by Government

§ 964. Regulation of speech by exercise of police power

Topic Summary | References | Correlation Table

West's Key Number Digest

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The constitutional guaranties of freedom of speech and of the press do not deprive the state of its right to enact laws in the legitimate exercise of the police power under which the state may adopt reasonable regulations of speech and press in order to promote the general welfare, public health, public safety and order, or public morals.

The State may enact reasonable regulations of speech and the press in the legitimate exercise of its police powers[1] in order to promote the general welfare,[2] to promote and advance public health,[3] public safety and order,[4] and public morals,[5] and to prevent fraud.[6]

The power of the state to abridge freedom of speech and of the press is the exception rather than the rule, and the legislature may not, under the guise of the police power, arbitrarily or unnecessarily interfere with the freedom of speech and of the press.[7]

A state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions,[8] or make the peaceful expression of unpopular views a crime.[9]

While the State may, under the police power, punish abuse of the right of free speech[10] by those who indulge in utterances which incite to violence and crime,[11] the fundamental right to speak cannot be abridged because other persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised.[12] Speakers may not be prohibited from speaking because they may say something which will lead to disorder.[13]

CUMULATIVE SUPPLEMENT

Cases:

To prevail on claim that his arrest was in retaliation for speech protected by First Amendment, plaintiff bears burden to show that retaliation was substantial or motivating factor for his arrest, and if he does so, burden shifts to officers to show that they would have arrested him absent that retaliatory motive. U.S. Const. Amend. 1. Novak v. City of Parma, 932 F.3d 421 (6th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Ga.—Pel Asso, Inc. v. Joseph, 262 Ga. 904, 427 S.E.2d 264 (1993).
Ind.—Price v. State, 622 N.E.2d 954 (Ind. 1993).
Mo.—Kansas City Premier Apartments, Inc. v. Missouri Real Estate Com'n, 344 S.W.3d 160 (Mo. 2011).
Discussed in §§ 699 et seq.
Limitation
To be a constitutional exercise of the police power of a state, a statute that punishes speech must not be overly broad.
Minn.—State v. Crawley, 819 N.W.2d 94 (Minn. 2012), cert. denied, 133 S. Ct. 1493, 185 L. Ed. 2d 548 (2013).

2 U.S.—Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143 (1942).
Okla.—McCormack v. Oklahoma Pub. Co., 1980 OK 98, 613 P.2d 737 (Okla. 1980).
Or.—City of Eugene v. Miller, 318 Or. 480, 871 P.2d 454 (1994).

3 N.Y.—People v. O'Sullivan, 96 Misc. 2d 52, 409 N.Y.S.2d 332 (App. Term 1978).
Or.—City of Eugene v. Miller, 318 Or. 480, 871 P.2d 454 (1994).
Balancing
Even so precious a freedom as freedom of speech must, in particular iterations, be balanced against the government's legitimate interests in protecting public health and safety.
U.S.—McCullen v. Coakley, 571 F.3d 167, 62 A.L.R.6th 739 (1st Cir. 2009).

4 U.S.—Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953).
Or.—City of Eugene v. Miller, 318 Or. 480, 871 P.2d 454 (1994).
Under state constitution
Ind.—Whittington v. State, 669 N.E.2d 1363 (Ind. 1996).
Balancing
The State's interest in promoting safety must be balanced against the rights of expression protected by the First Amendment, particularly with respect to political speech.
U.S.—Driver v. Town of Richmond ex rel. Krugman, 570 F. Supp. 2d 269 (D.R.I. 2008).

5 N.Y.—Sunshine Book Co. v. McCaffrey, 8 Misc. 2d 327, 112 N.Y.S.2d 476 (Sup 1952).

Ohio—R. K. O. Pictures v. Hissong, 68 Ohio L. Abs. 493, 123 N.E.2d 441 (C.P. 1954).

Gambling

N.J.—State v. W. U. Tel. Co., 12 N.J. 468, 97 A.2d 480 (1953).

6 N.Y.—People v. Kirk, 62 Misc. 2d 1078, 310 N.Y.S.2d 155 (County Ct. 1969).

7 U.S.—Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

La.—Jefferson Parish v. Bayou Landing Ltd., Inc., 350 So. 2d 158 (La. 1977).

Tex.—Iranian Muslim Organization v. City of San Antonio, 615 S.W.2d 202 (Tex. 1981).

Limitation on police power

The free speech guaranty operates as a limitation on the police power.

Mass.—Opinion of the Justices to the Senate, 373 Mass. 888, 366 N.E.2d 1220 (1977).

8 U.S.—Feiner v. New York, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295 (1951); Benson v. Rich, 448 F.2d 1371 (10th Cir. 1971).

Conn.—State v. Anonymous (1976-9), 33 Conn. Supp. 93, 363 A.2d 772 (C.P. 1976).

Okla.—Hennessey v. Independent School Dist. No. 4, Lincoln County, 1976 OK 101, 552 P.2d 1141 (Okla. 1976).

9 U.S.—Bachellar v. Maryland, 397 U.S. 564, 90 S. Ct. 1312, 25 L. Ed. 2d 570 (1970); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

Conn.—State v. Anonymous (1976-9), 33 Conn. Supp. 93, 363 A.2d 772 (C.P. 1976).

10 U.S.—Government of Virgin Islands v. Brodhurst, 6 V.I. 509, 285 F. Supp. 831 (D.V.I. 1968).

Minn.—Fine v. Bernstein, 726 N.W.2d 137 (Minn. Ct. App. 2007).

11 U.S.—Cox v. State of La., 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

N.C.—State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

12 U.S.—Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966); Beckerman v. City of Tupelo, Miss., 664 F.2d 502 (5th Cir. 1981).

N.J.—Faculty Ad Hoc October 15th Viet Nam Moratorium Committee v. Borough of Glassboro, 111 N.J. Super. 258, 268 A.2d 75 (Ch. Div. 1970).

13 U.S.—U. S. Servicemen's Fund v. Shands, 440 F.2d 44 (4th Cir. 1971); Shanley v. Northeast Independent School Dist., Bexar County, Tex., 462 F.2d 960 (5th Cir. 1972).

Duty of protection

Suppression by public officials or police of rights of free speech cannot be made an easy substitute for performance of their duty to protect peaceable, orderly speakers in the exercise of their rights against violent or disorderly retaliation.

U.S.—Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), judgment aff'd, 578 F.2d 1197 (7th Cir. 1978).

N.H.—State v. Nickerson, 120 N.H. 821, 424 A.2d 190 (1980).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
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16B C.J.S. Constitutional Law § 965

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

a. In General

§ 965. Standard of actual interference or threat to administration of justice; free speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1768, 2085 to 2121

The First Amendment constitutional guaranty of free speech and free press does not permit speech or expression that actually impedes or interferes with the orderly administration of justice or poses a serious and imminent threat to do so.

The First Amendment constitutional guaranty of free speech and free press does not permit speech or expression that actually impedes or interferes with the orderly administration of justice or poses an imminent threat to do so,[1] and criminal sanctions may constitutionally apply to speech in violation of this standard.[2] Nonetheless, freedom of discussion in regard to judicial proceedings should be given wide range compatible with the essential requirement of a fair and orderly administration of justice.[3]

A courtroom is a nonpublic forum for purposes of considering the scope of First Amendment limitations, requiring only a reasonable basis for speech restrictions.[4]

Footnotes

1 U.S.—In re McConnell, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962).
Mo.—Smith v. Pace, 313 S.W.3d 124 (Mo. 2010).
Interference with fair and impartial justice
U.S.—U.S. v. Heicklen, 858 F. Supp. 2d 256 (S.D. N.Y. 2012).
Serious and imminent threat
Ga.—In re Jefferson, 283 Ga. 216, 657 S.E.2d 830 (2008).
Mo.—Smith v. Pace, 313 S.W.3d 124 (Mo. 2010).

2 § 966.

3 U.S.—Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

4 U.S.—Mezibov v. Allen, 411 F.3d 712, 2005 FED App. 0264P (6th Cir. 2005).
Colo.—People v. Aleem, 149 P.3d 765 (Colo. 2007).
As to the standards for restrictions on speech in a nonpublic forum, generally, see § 989.
As to restrictions predicated on access to or egress from the courthouse, see § 967.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

a. In General

§ 966. Speech restrictions within judicial proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2085 to 2121

Properly limited criminal statutes may apply to speech or writing that impedes or interferes with the orderly administration of justice, within the First Amendment guaranty of free speech and free press.

Within the First Amendment guaranty of free speech and free press, speech or writing that actually impedes or interferes with the orderly administration of justice or poses a serious and imminent threat to do so is not protected,[1] and properly limited statutes may define and condemn specific conduct as a crime,[2] often in the form of criminal contempt statutes[3] extending to statements[4] and publications about judicial proceedings.[5]

The contempt power should not impair freedom of speech and press unless there is no doubt that the utterances involved are a serious and imminent threat to the administration of justice.[6] Intemperate language, false charges, or unfair criticism does not admit of judicial restraint or punishment unless there is an immediate clear and present danger imperiling the administration of justice.[7] Comments that are systematically designed to thwart the judicial process constitute a clear and present danger to

the administration of justice, and thus not protected by the First Amendment, so as to support a finding of criminal contempt.[8] In contrast, conduct involving the in-court display of political or religious expressions or statements is protected speech, particularly when the restraint is directed toward the conduct for that reason.[9]

Laws may appropriately prohibit demonstrations at or near a courthouse that obstruct or interfere with access or egress[10] or may punish false charges made against the court.[11]

Footnotes

1 § 965.

2 Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).
Mo.—Smith v. Pace, 313 S.W.3d 124 (Mo. 2010).
A.L.R. Library
Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt, 30 A.L.R.4th 155.
Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, 8 A.L.R.4th 769.
Picketing court or judge as contempt, 58 A.L.R.3d 1297.
Construction and Application of Federal Witness Tampering Statute, 18 U.S.C.A. s1512(b), 185 A.L.R. Fed. 1.

3 U.S.—Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962); In re McConnell, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962).
Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).
Mo.—Smith v. Pace, 313 S.W.3d 124 (Mo. 2010).

4 Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).

5 U.S.—Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).
As to reporting on judicial proceedings, generally, see §§ 978 to 982.

6 U.S.—Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).
Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).

7 U.S.—Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).
Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).

8 Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).

9 Colo.—People v. Aleem, 149 P.3d 765 (Colo. 2007).

10 § 967.

11 Ill.—D'Agostino v. Lynch, 382 Ill. App. 3d 960, 320 Ill. Dec. 446, 887 N.E.2d 590 (1st Dist. 2008).
As to disciplinary rules regarding attorney statements in or regarding judicial proceedings as within First Amendment rights, see § 970.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

a. In General

§ 967. Demonstration impacting use of courthouse

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1768, 2085, 2087

The First Amendment guaranty of free speech and free press does not permit speech that actually impedes or interferes with the orderly administration of justice or poses a serious and imminent threat to do so by obstructing or interfering with ingress to or egress from a courthouse.

Conduct which obstructs or interferes with ingress or egress to or from a courthouse bears no necessary relation to freedom to distribute information or opinion and may therefore be prohibited without abridging First Amendment liberties of speech and press.[1] States may promulgate laws designed to prohibit demonstrations in or near a courthouse provided the law's intent is to discourage the influence of judges in the discharge of their duty to administer justice.[2] Picketing or demonstrations near a courthouse may likewise be prohibited when the necessary obstruction or interference is shown or is likely.[3]

A statute which prohibits displaying, on the sidewalk surrounding the United States Supreme Court building, a flag, banner, or device designed or adapted to bring to public notice a party, organization, or movement is not a reasonable place restriction and is therefore invalid.[4]

Footnotes

1 U.S.—Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968).
Narrowly drawn ban sufficient
Cal.—People v. Tisbert, 11 Cal. App. 4th Supp. 1, 14 Cal. Rptr. 2d 128 (App. Dep't Super. Ct. 1992).
A.L.R. Library
Picketing court or judge as contempt, 58 A.L.R.3d 1297.

2 U.S.—Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968).

3 U.S.—Cox v. State of La., 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).
Pa.—Com. v. Schierscher, 447 Pa. Super. 61, 668 A.2d 164 (1995).

4 U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

b. Statements or Communications by Parties, Participants, or Attorneys

§ 968. Speech of parties or participants in judicial proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2085, 2089, 2090, 2093, 2097

Restrictions on public statements by parties or participants in judicial proceedings are consistent with First Amendment guarantees of free speech and press only when properly formulated and founded on a clear and present danger or imminent threat to the administration of justice.

To protect the right of the parties to a fair trial, a court may, without violating the First Amendment guaranty of freedom of speech, order parties to a pending action to refrain from making public statements with respect to the action.[1] However, an order restricting the speech of trial participants—typically known as a gag order—is a prior restraint on speech and thus is subject to strict judicial scrutiny.[2]

In order to enter a constitutionally sound protective order restricting speech in a civil case, the trial court must balance its interest in protecting the right to a fair trial against the parties' First Amendment rights.[3] The court may enter a protective order only when: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing

interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available.[4] Other courts have adopted the standard that a court should issue a gag order only if the speech presents a substantial likelihood of material prejudice to the proceedings, the proposed protective order is narrowly tailored, alternatives to the protective order would not be effective, and finally, the order would be effective in achieving the government's goal.[5]

The restriction of a protective order against extrajudicial statements by parties must meet the specificity requirements of the First Amendment[6] and must not be overbroad in relation to the parties' necessary ability to communicate with others as a practical requirement of conducting the litigation involving other parties, the government, and others as potential sources of evidence.[7]

In criminal proceedings, a court order that restricts trial participants' communications with the press will be upheld if government can establish that the activity restrained poses either a clear and present danger or serious and imminent threat to a protected competing interest, and the government must also establish that order has been narrowly drawn and is least restrictive means available.[8]

Statements in courtroom.

As to statements or expressions within the courtroom, a court's obligation to maintain courtroom decorum and ensure the parties' rights to a fair trial on balance outweighs the First Amendment rights of trial participants and spectators to express political views.[9] When fair trial rights are at a significant risk, the First Amendment rights of trial spectators must be curtailed; it must appear, however, that the speech in question, if in the nature of protected political speech, constitutes an imminent threat to the administration of justice and disturbs the proceedings.[10] A violation may occur when the court regulates speech based on the topic or subject matter in the nature of political or religious speech or expression, regardless of the viewpoint expressed, or when the court regulates speech based on the content of the position advocated.[11]

CUMULATIVE SUPPLEMENT

Cases:

Nondisparagement order in divorce case, which precluded the parties from posting disparaging remarks about the other spouse or the ongoing litigation on social media, was unconstitutional prior restraint on father's freedom of expression; no showing was made linking communications by either parent to any grave, imminent harm to the child, and the concern about potential harm that could occur if the child were to discover the speech in the future was speculative and could not justify a prior restraint. U.S. Const. Amend. 1. Shak v. Shak, 484 Mass. 658, 144 N.E.3d 274 (2020).

When a court as restricted news coverage in order to protect the identity of juvenile witnesses, in determining whether the restriction constitutes an unconstitutional prior restraint on speech, careful examination must be conducted of both the restrictive order's precise terms and whether the record supports the prior restraint on publication. U.S.C.A. Const.Amend. 1. Cheyenne Newspapers, Inc. v. First Judicial Dist. Court, 2015 WY 113, 358 P.3d 493 (Wyo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Aldawsari, 683 F.3d 660, 82 Fed. R. Serv. 3d 1074 (5th Cir. 2012).

N.C.—Oak Health Care Investors of North Carolina, Inc. v. Johnson, 209 N.C. App. 754, 710 S.E.2d 709 (2011).

Tex.—In re King, 293 S.W.3d 376 (Tex. App. Amarillo 2009).

A.L.R. Library

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt, 30 A.L.R.4th 155.

Validity and construction of state court's pretrial order precluding publicity or comment about pending case by counsel, parties, or witnesses, 33 A.L.R.3d 1041.

Validity and construction of federal court's pretrial order precluding publicity or comment about pending case by counsel, parties, or witnesses, 5 A.L.R. Fed. 948.

2 U.S.—Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013); U.S. v. McGregor, 838 F. Supp. 2d 1256 (M.D. Ala. 2012).

Cal.—Steiner v. Superior Court, 220 Cal. App. 4th 1479, 164 Cal. Rptr. 3d 155 (2d Dist. 2013), as modified on denial of reh'g, (Nov. 26, 2013) and review filed, (Dec. 13, 2013).

Miss.—In re R.J.M.B., 133 So. 3d 335 (Miss. 2013).

3 U.S.—Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).

Ala.—Ex parte Wright, 2014 WL 5311314 (Ala. 2014).

4 U.S.—Levine v. U.S. Dist. Court for Cent. Dist. of California, 764 F.2d 590 (9th Cir. 1985).

Miss.—In re R.J.M.B., 133 So. 3d 335 (Miss. 2013).

Nev.—Johanson v. Eighth Judicial Dist. Court of State of Nev. ex rel. County of Clark, 124 Nev. 245, 182 P.3d 94 (2008).

Tex.—In re King, 293 S.W.3d 376 (Tex. App. Amarillo 2009).

Alternative factors in standard

N.C.—Oak Health Care Investors of North Carolina, Inc. v. Johnson, 209 N.C. App. 754, 710 S.E.2d 709 (2011).

5 U.S.—U.S. v. McGregor, 838 F. Supp. 2d 1256 (M.D. Ala. 2012).

6 N.C.—Oak Health Care Investors of North Carolina, Inc. v. Johnson, 209 N.C. App. 754, 710 S.E.2d 709 (2011).

7 Ala.—Ex parte Wright, 2014 WL 5311314 (Ala. 2014).

Nev.—Johanson v. Eighth Judicial Dist. Court of State of Nev. ex rel. County of Clark, 124 Nev. 245, 182 P.3d 94 (2008).

8 U.S.—U.S. v. Aldawsari, 683 F.3d 660, 82 Fed. R. Serv. 3d 1074 (5th Cir. 2012).

9 Colo.—People v. Aleem, 149 P.3d 765 (Colo. 2007).

10 Mich.—In re Contempt of Dudzinski, 257 Mich. App. 96, 667 N.W.2d 68 (2003).

11 Colo.—People v. Aleem, 149 P.3d 765 (Colo. 2007).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

b. Statements or Communications by Parties, Participants, or Attorneys

§ 969. Speech of attorneys within judicial proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2093, 2095

Restrictions on public statements by attorneys as representatives for parties to judicial proceedings do not violate First Amendment guarantees of free speech and press when properly formulated and founded.

The speech of an attorney participating as a legal representative in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press under the First Amendment[1] and may be regulated under a less demanding standard than the "clear and present danger" First Amendment standard applicable to prior restraints of the press.[2] The limitations on attorneys' First Amendment rights of free speech inside and outside the courtroom in pending cases are based on an attorney's obligation to abstain from public debate that will obstruct the administration of justice.[3]

Gag orders directing attorneys to refrain from publicly discussing a pending case are prior restraints on speech based on content, subject to strict scrutiny under the First Amendment.[4] The limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial.[5] A prohibition against attorney statements

having a substantial likelihood of materially prejudicing an adjudicative proceeding is constitutionally permissible provided it imposes only narrow and necessary limitations on attorneys' speech.[6] A court's order should not impose categorical prohibitions but may provide examples of subjects that are likely to be materially prejudicial and that are thus unprotected by the First Amendment.[7]

CUMULATIVE SUPPLEMENT

Cases:

Gag order that prohibited district attorney and members of district attorney's office, defense counsel and persons related with office, defendant in related case and his counsel, court staff, and all law enforcement officials, past and present, who participated in investigation of eleven year-old murder case or had knowledge of case from making public statements about certain aspects of case, was impermissible prior restraint on speech; despite extensive media coverage, record did not show likelihood that persons to whom gag order was directed would make prejudicial statements, there were no reports attributing inflammatory statements or prejudicial information to sources covered by gag order, statements made by law enforcement officials prior to gag order were measured and highly unlikely to produce any prejudice, and none of lawyers, court personnel, or law enforcement personnel disclosed sensitive or confidential information nor attempted to effectively put defendant on trial in court of public opinion; disapproving *Atlanta Journal–Constitution v. State*, 266 Ga. App. 168, 596 S.E.2d 694. U.S. Const. Amend. 1. WXIA-TV v. State, 811 S.E.2d 378 (Ga. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991); U.S. v. Salameh, 992 F.2d 445 (2d Cir. 1993).

2 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).
Va.—Anthony v. Virginia State Bar ex rel. Ninth Dist. Committee, 270 Va. 601, 621 S.E.2d 121 (2005).

3 Va.—Anthony v. Virginia State Bar ex rel. Ninth Dist. Committee, 270 Va. 601, 621 S.E.2d 121 (2005).

4 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).
Miss.—In re R.J.M.B., 133 So. 3d 335 (Miss. 2013).
N.C.—Beaufort County Bd. of Educ. v. Beaufort County Bd. of Com'rs, 184 N.C. App. 110, 645 S.E.2d 857, 220 Ed. Law Rep. 949 (2007).

5 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991); U.S. v. Salameh, 992 F.2d 445 (2d Cir. 1993).
Blanket prohibition excessive
U.S.—Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).

6 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991); Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).
Civil and criminal standards
N.Y.—Fischetti v. Scherer, 44 A.D.3d 89, 840 N.Y.S.2d 575 (1st Dep't 2007).
Decorum order upheld
Ill.—People v. Kelly, 397 Ill. App. 3d 232, 336 Ill. Dec. 719, 921 N.E.2d 333 (1st Dist. 2009).

7 U.S.—U.S. v. Wecht, 484 F.3d 194 (3d Cir. 2007), as amended, (July 2, 2007).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

b. Statements or Communications by Parties, Participants, or Attorneys

§ 970. Speech of attorneys within judicial proceedings—Disciplinary rules

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2045 to 2047, 2052

Restrictions on public statements by attorneys as representatives for parties to judicial proceedings do not violate First Amendment guarantees of free speech and press when properly formulated and founded under disciplinary rules governing attorney conduct and responsibility.

Disciplinary rules governing the legal profession cannot punish attorney speech protected by the First Amendment,[1] but once an attorney enters the courtroom, whatever right to free speech the attorney has is extremely circumscribed in terms of permissible professional conduct.[2] For purposes of professional regulatory restrictions on the speech of attorneys in pending cases, the rules may permissibly subject an attorney to discipline for speech that falls generally into two categories: (1) speech made during the conduct of a courtroom proceeding; and (2) speech outside of a courtroom that creates a substantial likelihood of material prejudice to a pending adjudicatory proceeding.[3] Speech may be regulated if it poses a substantial likelihood of materially prejudicing a pending case,[4] or if it presents a serious and imminent threat to the fairness and integrity of the judicial system,[5]

both of which are less demanding standards than the requirement of a clear and present danger of actual prejudice or imminent threat otherwise required.[6]

An attorney's statements or arguments in court to the court or jury are subject to regulation by disciplinary action and are not protected by the First Amendment when they constitute misconduct within the meaning of the professional rules of conduct.[7] Violations of ethical standards do not constitute free speech.[8]

Footnotes

1 Ark.—Ligon v. Stilley, 2010 Ark. 418, 371 S.W.3d 615 (2010).
Mass.—In re Cobb, 445 Mass. 452, 838 N.E.2d 1197 (2005).
Va.—Hunter v. Virginia State Bar ex rel. Third Dist. Committee, 285 Va. 485, 744 S.E.2d 611 (2013), cert. denied, 133 S. Ct. 2871, 186 L. Ed. 2d 913 (2013).
W. Va.—Lawyer Disciplinary Bd. v. Hall, 234 W. Va. 298, 765 S.E.2d 187 (2014).

2 U.S.—Berry v. Schmitt, 688 F.3d 290 (6th Cir. 2012) (applying Kentucky law).

3 Mass.—Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 977 N.E.2d 524 (2012).

4 Va.—Hunter v. Virginia State Bar ex rel. Third Dist. Committee, 285 Va. 485, 744 S.E.2d 611 (2013), cert. denied, 133 S. Ct. 2871, 186 L. Ed. 2d 913 (2013).

5 Va.—Moseley v. Virginia State Bar, ex rel. Seventh Dist. Committee, 280 Va. 1, 694 S.E.2d 586 (2010).
W. Va.—Lawyer Disciplinary Bd. v. Hall, 234 W. Va. 298, 765 S.E.2d 187 (2014).

6 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

7 Kan.—In re Hawver, 300 Kan. 1023, 339 P.3d 573 (2014).
Tenn.—Bailey v. Board of Professional Responsibility, 441 S.W.3d 223 (Tenn. 2014).
Knowingly or recklessly false statements not protected
Mo.—In re Madison, 282 S.W.3d 350 (Mo. 2009).
Wis.—In re Disciplinary Proceedings Against Riordan, 2012 WI 125, 345 Wis. 2d 42, 824 N.W.2d 441 (2012).

8 Kan.—In re Landrith, 280 Kan. 619, 124 P.3d 467 (2005).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 971. General right of access and applicable standards

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1204, 2087

The First Amendment guarantees the news media and the public free access to civil and criminal trials and other judicial proceedings, but their activities are subject to regulation to prevent interference with judicial proceedings.

The First Amendment secures to the news media and the public[1] a right of access to civil trials and judicial proceedings,[2] criminal trials or proceedings,[3] and judicial records, transcripts, and related materials.[4] The First Amendment does not distinguish between access to civil proceedings and criminal proceedings and does not distinguish between branches of government.[5]

Under what is commonly referred to as the "experience and logic" test, two questions should be asked to determine whether the First Amendment right of access applies to a particular court proceeding: (1) whether the place and process have historically been open to the press and general public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question.[6] If a proceeding satisfies these tests, the right of access is not absolute but is a presumption that

may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[7]

The press and public may constitutionally be excluded from a trial only in limited circumstances when the state's justification is a weighty one.[8] The presumption of access can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.[9]

When the state interest to be served by denying access to judicial proceedings is to prevent the disclosure of sensitive information, the denial of access must be necessitated by a compelling governmental interest and must be narrowly tailored to serve that interest.[10]

Rights of accused in criminal proceedings.

The qualified right to access criminal proceedings is subject to the rights of the accused.[11] If a criminal defendant claims that public access to the defendant's trial interferes with the defendant's right to a fair trial, the defense must demonstrate that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.[12]

CUMULATIVE SUPPLEMENT

Cases:

In determining whether a First Amendment right of access to criminal proceedings exists, courts must determine: (1) whether the proceeding has historically been open to the public and press, and (2) whether public access plays a significant positive role in the functioning of the particular process in question. U.S. Const. Amend. 1. United States v. Sealed Search Warrants, 868 F.3d 385 (5th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 § 972.

2 U.S.—New York Civil Liberties Union v. New York City Transit Authority, 684 F.3d 286 (2d Cir. 2012); Doe v. Public Citizen, 749 F.3d 246 (4th Cir. 2014).
Cal.—McNair v. National Collegiate Athletic Association, 234 Cal. App. 4th 25, 183 Cal. Rptr. 3d 490, 314 Ed. Law Rep. 495 (2d Dist. 2015).
Mass.—Com. v. Fujita, 470 Mass. 484, 23 N.E.3d 882 (2015).
N.Y.—In re Adoption of Child A, 45 Misc. 3d 1017, 994 N.Y.S.2d 832 (Sur. Ct. 2014).
Wash.—In re Adoption of M.S.M.-P., 181 Wash. App. 301, 325 P.3d 392 (Div. 1 2014), review granted, 182 Wash. 2d 1001, 342 P.3d 326 (2015).
Civil contempt proceedings
U.S.—Newsday LLC v. County of Nassau, 730 F.3d 156 (2d Cir. 2013).
Not applicable to civil commitment proceedings
Cal.—Sorenson v. Superior Court, 219 Cal. App. 4th 409, 161 Cal. Rptr. 3d 794 (6th Dist. 2013), review denied, (Nov. 13, 2013).

3 U.S.—Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I); Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); U.S. v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014).
Mass.—Com. v. Winfield, 464 Mass. 672, 985 N.E.2d 86 (2013).
Ohio—State ex rel. Cincinnati Enquirer v. Sage, 2013-Ohio-2270, 992 N.E.2d 1178 (Ohio Ct. App. 12th Dist. Butler County 2013), judgment aff'd in part, rev'd in part on other grounds, 2015-Ohio-974, 2015 WL 1244536 (Ohio 2015).
Wash.—State v. Jones, 175 Wash. App. 87, 303 P.3d 1084 (Div. 2 2013).
A.L.R. Library
Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 A.L.R.4th 476.

4 § 973.

5 U.S.—New York Civil Liberties Union v. New York City Transit Authority, 684 F.3d 286 (2d Cir. 2012).

6 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II); Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388 (5th Cir. 2014); In re Search of Fair Finance, 692 F.3d 424 (6th Cir. 2012); U.S. v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014).
Pa.—Com. v. Selenski, 2010 PA Super 68, 996 A.2d 494 (2010).
Wash.—State v. Jones, 175 Wash. App. 87, 303 P.3d 1084 (Div. 2 2013).
Open court business arbitration proceedings
U.S.—Delaware Coalition for Open Government, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013), cert. denied, 134 S. Ct. 1551, 188 L. Ed. 2d 581 (2014).
No access to proceedings under Stored Communications Act
U.S.—In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013).

7 U.S.—Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I); American Civil Liberties Union v. Holder, 673 F.3d 245 (4th Cir. 2011); U.S. v. Guerrero, 693 F.3d 990 (9th Cir. 2012).
Ill.—In re Gee, 353 Ill. Dec. 598, 956 N.E.2d 460 (App. Ct. 4th Dist. 2010).
Mass.—Com. v. Winfield, 464 Mass. 672, 985 N.E.2d 86 (2013).
Ohio—State ex rel. Cincinnati Enquirer v. Sage, 2013-Ohio-2270, 992 N.E.2d 1178 (Ohio Ct. App. 12th Dist. Butler County 2013), judgment aff'd in part, rev'd in part on other grounds, 2015-Ohio-974, 2015 WL 1244536 (Ohio 2015).
A.L.R. Library
Propriety of exclusion of press or other media representatives from civil trial, 39 A.L.R.5th 103.

8 U.S.—Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

9 U.S.—U.S. v. Brice, 649 F.3d 793 (D.C. Cir. 2011).

10 U.S.—Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).
Safeguarding a minor
Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).

11 U.S.—U.S. v. Guerrero, 693 F.3d 990 (9th Cir. 2012).
A.L.R. Library
Basis for Exclusion of Public from State Criminal Trial in Order to Preserve Safety, Confidentiality, or Well-Being of Witness Who Is Not Undercover Police Officer, 33 A.L.R.6th 1.
Determination of Request for Exclusion of Public from State Criminal Trial in Order to Preserve the Safety, Confidentiality, or Well-Being of Witness Who Is Not Undercover Police Officer—Issues of Proof, Consideration of Alternatives, and Scope of Closure, 32 A.L.R.6th 171.
Right of accused to have press or other media representatives excluded from criminal trial, 49 A.L.R.3d 1007.
Right of person accused of crime to exclude public from preliminary hearing or examination, 31 A.L.R.3d 816.

12 Cal.—Alvarez v. Superior Court, 154 Cal. App. 4th 642, 64 Cal. Rptr. 3d 854 (1st Dist. 2007), as modified on other grounds (Aug. 27, 2007).

End of Document

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 972. Right common to news media and public

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2087

The news media and public have in common a right of free access to civil and criminal trials and other judicial proceedings, subject to regulation to prevent interference with judicial proceedings within the constraints of the First Amendment guarantees of free speech and press.

Under the First Amendment guarantees of free speech and press, the right of access to civil and criminal trials and other judicial proceedings[1] applies to both the public and the news media or press[2] and, as between the public and press, is contemporaneous[3] and equal.[4]

Broadcast media.

Particular issues are presented with respect to the broadcast media's right of access to the judicial system.[5]

CUMULATIVE SUPPLEMENT

Cases:

Representatives of the press, asserting a First Amendment right of access, must be given an opportunity to be heard on the question of their exclusion from a court proceeding. U.S. Const. Amend. 1. Trump v. Deutsche Bank AG, 940 F.3d 146 (2d Cir. 2019).

The media have neither a greater nor a lesser right than any other member of the public under the First Amendment to attend a judicial proceeding and to review the records of that proceeding. U.S. Const. Amend. 1. Boston Globe Media Partners, LLC v. Chief Justice of Trial Court, 130 N.E.3d 742 (Mass. 2019).

Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it; reliance must rest upon the judgment of those who decide what to publish or broadcast. U.S.C.A. Const.Amend. 1. Cheyenne Newspapers, Inc. v. First Judicial Dist. Court, 2015 WY 113, 358 P.3d 493 (Wyo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 § 971.

2 U.S.—Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).
Md.—Longus v. State, 416 Md. 433, 7 A.3d 64 (2010).
S.D.—Rapid City Journal v. Delaney, 2011 SD 55, 804 N.W.2d 388 (S.D. 2011).
Wash.—Tacoma News, Inc. v. Cayce, 172 Wash. 2d 58, 256 P.3d 1179 (2011).
A.L.R. Library
Propriety of exclusion of press or other media representatives from civil trial, 39 A.L.R.5th 103.

3 U.S.—Doe v. Public Citizen, 749 F.3d 246 (4th Cir. 2014).
U.S.—Daily Press, Inc. v. Com., 285 Va. 447, 739 S.E.2d 636 (2013).

4 U.S.—Courthouse News Service v. Planet, 750 F.3d 776 (9th Cir. 2014).
N.D.—Rapid City Journal v. Delaney, 2011 SD 55, 804 N.W.2d 388 (S.D. 2011).

5 § 979.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 973. Judicial records, transcripts, exhibits, and other papers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2087, 2089, 2109

The access of the press and public to civil and criminal trials and other judicial proceedings encompasses access to judicial records, exhibits, and other papers, within the First Amendment guarantees of free speech and press.

The First Amendment guarantees of free speech and press, including a right of access to civil and criminal trials and other judicial proceedings,[1] also includes a right of access to the records of proceedings[2] when the records are such that (1) have been historically open to the public, and (2) have a purpose and function that would be furthered by disclosure,[3] under the generally applicable "experience and logic" test.[4] For the right to apply to a particular document, it must be a judicial record,[5] excluding discovery materials not admitted into evidence.[6]

The presumptive right prevails unless it is overcome by specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.[7] The party seeking closure must show a substantial probability of harm to an overriding interest which has been identified; a reasonable likelihood of harm does not

suffice.[8] The First Amendment right of access to judicial records and documents yields only in the existence of a compelling governmental interest and under a restriction that is narrowly tailored to service that interest.[9]

The right is not absolute; the court has supervisory power over its own records and files and may deny access in an appropriate case.[10] Restrictions may be based on a statute or the court's inherent power to control its own records and supervise the functioning of the judicial system.[11]

Different levels of protection may attach to the various court records and documents involved in a given case; irrelevant discovery materials or materials as to which evidentiary objections are sustained are not submitted as a basis for adjudication and thus are not within the ambit of the First Amendment right of access to court records.[12]

A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file; likewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records.[13] The closure of records from material witness proceedings concerning victims of sex crimes is constitutionally permissible when the redaction of sensitive information is not a viable alternative to closure, when the proceedings contain substantial amounts of material of an especially personal and private nature relating to the medical, educational, and mental health progress of minor victims.[14]

A qualified right of access applies to closed criminal proceeding records, once the overriding interests that militated for closure of the proceedings are no longer viable.[15]

Matters disclosed in discovery.

A litigant does not have a First Amendment right of access to information made available only for purposes of trying the litigant's suit; the information may be made the subject of a protective order.[16]

CUMULATIVE SUPPLEMENT

Cases:

County's policies for public access to newly-filed nonconfidential civil complaints were subject to rigorous balancing test, but not strict scrutiny, under First Amendment; county scanned complaints and provided same-day access to most complaints on public computer terminals, and policies resembled time, place, and manner restrictions, were content-neutral, and affected only timing of access to newly-filed complaints. U.S. Const. Amend. 1. Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).

Use of term "warrant" in Stored Communications Act (SCA) did not preclude finding that SCA warrants were more analogous to subpoenas, to which no recognized First Amendment right of access attached, than to traditional search warrants, where nothing in SCA's text, structure, or legislative history suggested congressional design to incorporate into SCA any understanding that the public had First Amendment right of access to records related to an SCA warrant once related investigation had come to an end. U.S. Const. Amends. 1, 4; 18 U.S.C.A. § 2703(a). Matter of Leopold, 327 F. Supp. 3d 1 (D.D.C. 2018).

Public, via media and investigative reporter, did not have right of access, either under First Amendment or common law, to documents exchanged during discovery that were designated by parties as confidential and made part of protective order, in defamation action; documents at issue included range of allegations of sexual acts involving plaintiff and non-parties to litigation, some of whom were famous, identities of non-parties who either allegedly engaged in sexual acts with plaintiff or

who allegedly facilitated such acts, plaintiff's sexual history and prior allegations of sexual assault, and her medical history, parties mutually agreed that release of confidential information inherent to discovery process could expose them to annoyance, embarrassment, and oppression given highly sensitive nature of underlying allegations, sealed documents were neither relied upon in rendering of adjudication nor necessary to or helpful in resolving any motion, and parties submitted redacted proposed opinion on summary judgment to maintain confidentiality established by protective order. U.S. Const. Amend. 1. Giuffre v. Maxwell, 325 F. Supp. 3d 428 (S.D. N.Y. 2018).

The public has no First Amendment or state constitutional right to view the records of show cause hearings that did not result in the issuance of a criminal complaint. U.S. Const. Amend. 1; Mass. Const. pt. 1, art. 16; Mass. Gen. Laws Ann. ch. 218, § 35A. Boston Globe Media Partners, LLC v. Chief Justice of Trial Court, 130 N.E.3d 742 (Mass. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 971.

2 U.S.—Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I); Newsday LLC v. County of Nassau, 730 F.3d 156 (2d Cir. 2013); Doe v. Public Citizen, 749 F.3d 246 (4th Cir. 2014); U.S. v. Brice, 649 F.3d 793 (D.C. Cir. 2011).
Cal.—Sander v. State Bar of Cal., 58 Cal. 4th 300, 165 Cal. Rptr. 3d 250, 314 P.3d 488 (2013).
Ill.—In re Gee, 353 Ill. Dec. 598, 956 N.E.2d 460 (App. Ct. 4th Dist. 2010).
Strong presumption of access to transcripts
Mass.—Com. v. Winfield, 464 Mass. 672, 985 N.E.2d 86 (2013).
A.L.R. Library
Restricting public access to judicial records of state courts, 84 A.L.R.3d 598.
Propriety and Scope of Protective Order Against Disclosure of Material Already Entered into Evidence in Federal Court Trial, 138 A.L.R. Fed. 153.
Public access to records and proceedings of civil actions in Federal District Courts, 96 A.L.R. Fed. 769 (superseded by Propriety and Scope of Protective Order Against Disclosure of Material Already Entered into Evidence in Federal Court Trial, 138 A.L.R. Fed. 153), (§ 8 superseded by, Propriety and scope of protective order against disclosure of material already entered into evidence in federal court trial, 138 A.L.R. Fed. 153).

3 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II); U.S. v. Erie County, N.Y., 763 F.3d 235 (2d Cir. 2014); Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388 (5th Cir. 2014).
Ill.—In re Gee, 353 Ill. Dec. 598, 956 N.E.2d 460 (App. Ct. 4th Dist. 2010).
No access to orders under Stored Communications Act
U.S.—In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013).

4 § 971.

5 U.S.—In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013); Sky Angel U.S., LLC v. Discovery Communications, LLC, 28 F. Supp. 3d 465 (D. Md. 2014).

6 U.S.—U.S. v. Bulger, 283 F.R.D. 46 (D. Mass. 2012); Dorsett v. County of Nassau, 289 F.R.D. 54 (E.D. N.Y. 2012); U.S. v. Smith, 985 F. Supp. 2d 506 (S.D. N.Y. 2013).

7 U.S.—Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I); Newsday LLC v. County of Nassau, 730 F.3d 156 (2d Cir. 2013); In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013).
Cal.—Sander v. State Bar of Cal., 58 Cal. 4th 300, 165 Cal. Rptr. 3d 250, 314 P.3d 488 (2013).
Ill.—In re Gee, 353 Ill. Dec. 598, 956 N.E.2d 460 (App. Ct. 4th Dist. 2010).

8 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II).

9 U.S.—In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283 (4th Cir. 2013).

10 Ill.—In re Gee, 353 Ill. Dec. 598, 956 N.E.2d 460 (App. Ct. 4th Dist. 2010).

11 S.C.—Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006).

12 Cal.—Overstock.Com, Inc. v. Goldman Sachs Group, Inc., 231 Cal. App. 4th 471, 180 Cal. Rptr. 3d 234 (1st Dist. 2014).

13 S.C.—Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006).

14 U.S.—U.S. v. Brice, 649 F.3d 793 (D.C. Cir. 2011).

15 Haw.—Oahu Publications Inc. v. Ahn, 133 Haw. 482, 331 P.3d 460 (2014), as corrected (Aug. 5, 2014).

16 U.S.—Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17, 38 Fed. R. Serv. 2d 1606 (1984).

Nondisclosure order not prior restraint

Colo.—In re Requests for Investigation of Attorney E., 78 P.3d 300 (Colo. 2003).

A.L.R. Library

Restriction on dissemination of information obtained through pretrial discovery proceedings as violating Federal Constitution's First Amendment—federal cases, 81 A.L.R. Fed. 471.

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 A.L.R. Fed. 871.

End of Document

16B C.J.S. Constitutional Law § 974

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 974. Juvenile proceedings and records

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2087

The right of access by the press and public to civil and criminal trials and other judicial proceedings, within the First Amendment guarantees of free speech and press, does not fully extend to juvenile proceedings.

The right of access by the press and public to civil and criminal trials and other judicial proceedings, within the First Amendment guarantees of free speech and press,[1] does not include a guarantee of openness and access to juvenile proceedings and the records generated pursuant to juvenile proceedings[2] although the court's exercise of discretion in this regard is not unlimited and must be exercised in accordance with the applicable constitutional limitations.[3] Particular statutes or orders may require or permit the exclusion of the press and public from juvenile proceedings, consistent with the guaranties of the First Amendment.[4]

Footnotes

1 § 971.

2 Cal.—People v. Dixon, 148 Cal. App. 4th 414, 56 Cal. Rptr. 3d 33 (4th Dist. 2007).

A.L.R. Library

Propriety of exclusion of press or other media representatives from civil trial, 39 A.L.R.5th 103 (§§ 47 to 53(b), constitutional considerations in juvenile delinquency proceedings).

3 Md.—Baltimore Sun Co. v. State, 340 Md. 437, 667 A.2d 166 (1995).

4 R.I.—Edward A. Sherman Pub. Co. v. Goldberg, 443 A.2d 1252 (R.I. 1982).

Vt.—In re J. S., 140 Vt. 458, 438 A.2d 1125 (1981).

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16B C.J.S. Constitutional Law § 975

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 975. Pretrial and posttrial proceedings and records

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2087, 2107

Criminal pretrial and posttrial hearings or proceedings are within the right of access by the public or the press under the First Amendment guarantees of free speech and press, subject to a balancing of interests including the rights of a defendant and of a victim; the right does not extend to civil pretrial discovery proceedings.

The right of access by the press and public to civil and criminal trials and other judicial proceedings, within the First Amendment guarantees of free speech and press,[1] does not apply to civil pretrial discovery proceedings[2] but does apply to criminal pretrial hearings,[3] subject to the requirement for a balancing of competing interests, such as a defendant's right to a fair trial[4] or a victim's right to privacy.[5] Nonetheless, closure requires specific on-the-record findings demonstrating that it is essential to preserve higher values, and the closure order must be tailored to serve those needs.[6] Generally, access is not afforded in pretrial hearings on the suppression of evidence, or hearings to determine whether the case should be dismissed because of entrapment, or for similar reasons.[7] Nonetheless, a requirement to hold preliminary hearings privately unless the defendant requests otherwise

violates the First Amendment[8] as does a statute which requires closure of a preliminary examination on the request of the defendant.[9]

The First Amendment does not require access to documents filed in support of search warrant applications,[10] and the press does not have a First Amendment right of access to a search warrant affidavit.[11]

Posttrial hearings.

The right of access attaches to posttrial hearings to investigate jury misconduct.[12]

CUMULATIVE SUPPLEMENT

Cases:

Neither experience nor logic points to First Amendment right to access search warrants and related materials issued in connection with an ongoing grand jury investigation; proceedings for the issuance of search warrants are not, and have not been, public, and although in a generalized sense, public access to grand jury-related search warrant materials may very well promote the integrity of the criminal justice system, such interests are outweighed by the inevitable negative ramifications of disclosure on grand jury secrecy and the jeopardy it would pose to the criminal investigatory process. U.S. Const. Amend. 1. In re 2014 Allegheny County Investigating Grand Jury, 223 A.3d 214 (Pa. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 971.

2 U.S.—Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17, 38 Fed. R. Serv. 2d 1606 (1984).

3 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II); U.S. v. Guerrero, 693 F.3d 990 (9th Cir. 2012).
Wyo.—Circuit Court of Eighth Judicial Dist. v. Lee Newspapers, 2014 WY 101, 332 P.3d 523 (Wyo. 2014).
A.L.R. Library
Right of person accused of crime to exclude public from preliminary hearing or examination, 31 A.L.R.3d 816.

4 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II).
Ill.—People v. Kelly, 397 Ill. App. 3d 232, 336 Ill. Dec. 719, 921 N.E.2d 333 (1st Dist. 2009).

5 Ill.—People v. Kelly, 397 Ill. App. 3d 232, 336 Ill. Dec. 719, 921 N.E.2d 333 (1st Dist. 2009).
Privacy necessity not established
U.S.—U.S. v. Guerrero, 693 F.3d 990 (9th Cir. 2012).

6 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II).
Wyo.—Circuit Court of Eighth Judicial Dist. v. Lee Newspapers, 2014 WY 101, 332 P.3d 523 (Wyo. 2014).

7 U.S.—U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982).

8 U.S.—El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico, 508 U.S. 147, 113 S. Ct. 2004, 124 L. Ed. 2d 60 (1993).

9 U.S.—Billings Gazette, a Div. of Lee Enterprises, Inc. v. Justice Court of Thirteenth Judicial Dist. of State of Mont., In and For County of Yellowstone, 771 F. Supp. 1062 (D. Mont. 1987).

10 U.S.—In re Search of Fair Finance, 692 F.3d 424 (6th Cir. 2012); U.S. v. Business of Custer Battlefield Museum and Store Located at Interstate 90, Exit 514, South of Billings, Mont., 658 F.3d 1188 (9th Cir. 2011).

11 U.S.—U.S. v. All Funds on Deposit at Wells Fargo Bank in San Francisco, California, in Account No. 7986104185, Held in the Name of Account Services Inc., and All Property Traceable Thereto, 643 F. Supp. 2d 577 (S.D. N.Y. 2009).

12 U.S.—U.S. v. Simone, 14 F.3d 833 (3d Cir. 1994).

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16B C.J.S. Constitutional Law § 976

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 976. Voir dire proceedings; jury selection records

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2087, 2116

The right of the public and the press to access civil and criminal trials and proceedings, within the First Amendment guarantees of free speech and press, applies to voir dire proceedings and to juror selection questionnaires and empanelment lists.

The right of access by the press and public to civil and criminal trials and other judicial proceedings, within the First Amendment guarantees of free speech and press,[1] applies to voir dire proceedings,[2] juror questionnaires from the jury selection process,[3] and juror selection or empanelment lists.[4] The presumption of open access may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[5] Partial exclusion must be justified by specific findings[6] beyond a mere concern that potential jurors might be less candid if questioned in public is insufficient.[7] If the court does not consider alternatives to exclusion or closure, it cannot constitutionally close voir dire.[8]

Footnotes

1 § 971.

2 U.S.—Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I).
Fla.—Morris Publishing Group, LLC v. State, 136 So. 3d 770 (Fla. 1st DCA 2014).
Me.—In re Maine Today Media, Inc., 2013 ME 12, 59 A.3d 499 (Me. 2013).
A.L.R. Library
Exclusion of public and media from voir dire examination of prospective jurors in state criminal case, 16 A.L.R.5th 152.

3 D.C.—In re Jury Questionnaires, 37 A.3d 879 (D.C. 2012).
Nev.—Stephens Media, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 125 Nev. 849, 221 P.3d 1240 (2009).
Generic addresses sufficient
U.S.—U.S. v. Bruno, 700 F. Supp. 2d 175 (N.D. N.Y. 2010).
Names only, not addresses
Pa.—Com. v. Long, 592 Pa. 42, 922 A.2d 892 (2007).

4 U.S.—U.S. v. Wecht, 537 F.3d 222 (3d Cir. 2008).
Mass.—Com. v. Fujita, 470 Mass. 484, 23 N.E.3d 882 (2015).
A.L.R. Library
Propriety of order forbidding news media from publishing names and addresses of jurors in criminal cases, 36 A.L.R.4th 1126.

5 U.S.—Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I).
Presumption not overcome
U.S.—U.S. v. Wecht, 537 F.3d 222 (3d Cir. 2008).
Fla.—Morris Publishing Group, LLC v. State, 136 So. 3d 770 (Fla. 1st DCA 2014).

6 Tex.—Houston Chronicle Pub. Co. v. Crapitto, 907 S.W.2d 99 (Tex. App. Houston 14th Dist. 1995).

7 U.S.—U.S. v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

8 Tex.—Houston Chronicle Pub. Co. v. Crapitto, 907 S.W.2d 99 (Tex. App. Houston 14th Dist. 1995).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

c. Access to Trials, Judicial Proceedings, and Records

§ 977. Grand jury proceedings or records

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2110, 2117

The right of the public and the press to access civil and criminal trials and proceedings, within the First Amendment guarantees of free speech and press, does not generally apply to grand jury proceedings or records.

The right of the public and the press to access civil and criminal trials and proceedings, within the First Amendment guarantees of free speech and press,[1] does not generally apply to grand jury proceedings,[2] grand jury records,[3] or transcripts,[4] court records containing documents presented before the grand jury,[5] or ancillary materials related to the proceedings.[6]

Footnotes

1 § 971.

2 U.S.—Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II); U.S. v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014).
Cal.—Alvarez v. Superior Court, 154 Cal. App. 4th 642, 64 Cal. Rptr. 3d 854 (1st Dist. 2007), as modified, (Aug. 27, 2007).

3 U.S.—U.S. v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014).

4 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005); U.S. v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014).

5 U.S.—In re Newark Morning Ledger Co., 260 F.3d 217 (3d Cir. 2001).

6 U.S.—In re Grand Jury Subpoena, Judith Miller, 493 F.3d 152 (D.C. Cir. 2007).

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16B C.J.S. Constitutional Law § 978

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 978. General standard applicable

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2085 to 2121

The First Amendment guaranty of free speech and press generally allows the press to report or disseminate information gathered lawfully and from proceedings in open court or public records.

The right to report court proceedings is, in general, protected by the First Amendment guaranty of free speech and press,[1] but the freedom of the news media or press should not be allowed to divert a trial from the very purpose of the court system to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the court room according to legal procedure.[2]

Except in extraordinary circumstances,[3] news media are ordinarily free to publish information lawfully obtained,[4] including all matters, events, and disclosures which take place in open court,[5] whether in juvenile delinquency proceedings,[6] or preliminary hearings,[7] or matters disclosed by court records open to public inspection.[8]

Protective orders preventing the public dissemination of court records in a particular case are subject to the court's obligation to balance the need for confidentiality against public-access concerns and should be lifted in the absence of good cause to continue protection.[9]

Statutes which make it an offense to publish accounts of particular classes of proceedings based on information lawfully obtained without court permission are generally invalid.[10] A statute may not validly provide that the name of a juvenile in custody or information about juvenile proceedings must not be made public, nor require the court's permission for publication of such matters, at least to the extent that it applies to information lawfully obtained by news media, and in the absence of support by a state interest of the highest order.[11]

Footnotes

1 U.S.—Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).
Newspapers
U.S.—The Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989).
Cal.—Freedom Communications, Inc. v. Superior Court, 167 Cal. App. 4th 150, 83 Cal. Rptr. 3d 861 (4th Dist. 2008), as modified, (Sept. 29, 2008).

2 U.S.—Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); U.S. v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

3 U.S.—Central South Carolina Chapter, Soc. of Professional Journalists, Sigma Delta Chi v. U.S. Dist. Court for Dist. of South Carolina, 551 F.2d 559 (4th Cir. 1977).

4 Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).

5 U.S.—Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 95 S. Ct. 1, 42 L. Ed. 2d 17 (1974).
Ky.—Cape Publications, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001).

6 U.S.—Oklahoma Pub. Co. v. District Court In and For Oklahoma County, 430 U.S. 308, 97 S. Ct. 1045, 51 L. Ed. 2d 355 (1977).

7 U.S.—Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

8 U.S.—Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).
Recordings used as evidence
U.S.—Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978).

9 U.S.—U.S. v. Wecht, 484 F.3d 194 (3d Cir. 2007), as amended on other grounds, (July 2, 2007).

10 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).
Name of rape victim
U.S.—The Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989).

11 U.S.—Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979).

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16B C.J.S. Constitutional Law § 979

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 979. General standard applicable—Televising, broadcasting, or electronic media

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2099, 2118

The First Amendment guaranty of free speech and press does not include a right to photograph, record, televise, or broadcast a trial, but permission may be granted.

Generally, there is no First Amendment right to televise or broadcast a trial,[1] nor to have recording or photographic equipment in the courtroom, but the latter may be permitted pursuant to court rules.[2] Some states have permitted limited video and audio coverage of proceedings in certain state courtrooms, subject to such conditions as consent of the judges and parties, prohibitions to protect certain confidential information or identities, and protections against intrusive equipment and personnel.[3]

A state statutory categorical prohibition of television and radio coverage and broadcasting of criminal trial proceedings in the courtroom did not extend to electronic communication from the courtroom by a real-time information network.[4]

Footnotes

1 U.S.—Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 40 Fed. R. Serv. 2d 759 (2d Cir. 1984); Conway v. U.S., 852 F.2d 187 (6th Cir. 1988).
Cal.—People v. Dixon, 148 Cal. App. 4th 414, 56 Cal. Rptr. 3d 33 (4th Dist. 2007).
N.Y.—Courtroom Television Network LLC v. State of New York, 5 N.Y.3d 222, 800 N.Y.S.2d 522, 833 N.E.2d 1197 (2005).
Not altered by high-profile trial
Okla.—Nichols v. District Court of Oklahoma County, 2000 OK CR 12, 6 P.3d 506 (Okla. Crim. App. 2000).
A.L.R. Library
Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

2 § 982.

3 Ind.—In re Pilot Project for Electronic News Coverage in Indiana Trial Courts, 895 N.E.2d 1161 (Ind. 2006).
State court rules for electronic and photographic coverage
Miss.—Stephens v. State, 911 So. 2d 424 (Miss. 2005).

4 Conn.—State v. Komisarjevsky, 51 Conn. L. Rptr. 485, 51 Conn. L. Rptr. 522, 39 Media L. Rep. (BNA) 1727, 2011 WL 1032111 (Conn. Super. Ct. 2011).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 980. Test for prior restraint

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2085 to 2121

The First Amendment guaranty of free speech and press is not subject to prior restraints on reporting or disseminating information gathered lawfully and from proceedings in open court or public records.

Rules of court or orders in particular proceedings which restrict the activities of media personnel in obtaining information with respect to judicial proceedings, or the publication of such information, often amount to prior restraints of exercise of the rights of freedom of speech or press[1] and are therefore subject to the rules which govern such restraints generally.[2] Prior restraints are presumed to be invalid[3] and may be sustained only when the activity restrained poses a clear and present danger or a serious and imminent threat to a compelling governmental interest[4] or a substantial likelihood of prejudice to the conduct of a fair trial.[5] Sustaining a prior restraint on media dissemination requires considering whether the harm the court seeks to prevent justifies the restraint on speech.[6]

The restrictions must be narrowly drawn so as to serve that interest without unnecessary interference with expression which does not threaten it.[7]

A court order stating that the broadcast, publication, or disclosure of particular information from a judicial proceeding is punishable by criminal contempt of court and as a statutory violation constitutes a threat against a specific publication and raises special First Amendment concerns since it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability, particularly if not accompanied by notice or hearing or any other of the usual safeguards of the judicial process; it then bears many of the marks of a prior restraint.[8] The order is of further concern if it singles out a particular actor not a party to the case but is less so if directed only to the conduct of parties.[9]

CUMULATIVE SUPPLEMENT

Cases:

A judicial order prohibiting the publication of information disclosed in a public judicial proceeding unavoidably clashes with two basic protections that the First Amendment provides; that is, the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom. U.S.C.A. Const.Amend. 1. Cheyenne Newspapers, Inc. v. First Judicial Dist. Court, 2015 WY 113, 358 P.3d 493 (Wyo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); U.S. v. Quattrone, 402 F.3d 304 (2d Cir. 2005).
Protective order as prior restraint
U.S.—Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).
Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).
Ohio—State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas, 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634 (2010).
Criminal nondisclosure statute not prior restraint
N.H.—Associated Press v. State, 153 N.H. 120, 888 A.2d 1236 (2005).

2 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005); Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 96 S. Ct. 251, 46 L. Ed. 2d 237 (1975).

3 U.S.—Nebraska Press Ass'n v. Stuart, 423 U.S. 1319, 96 S. Ct. 237, 46 L. Ed. 2d 199 (1975); Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).
Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).
Ohio—State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas, 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634 (2010).

4 U.S.—Nebraska Press Ass'n v. Stuart, 423 U.S. 1319, 96 S. Ct. 237, 46 L. Ed. 2d 199 (1975).
Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).

5 U.S.—Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).
Ohio—State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas, 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634 (2010).

6 U.S.—Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).
Not sufficiently compelling interest

Cal.—Freedom Communications, Inc. v. Superior Court, 167 Cal. App. 4th 150, 83 Cal. Rptr. 3d 861 (4th Dist. 2008), as modified, (Sept. 29, 2008).
Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).

7 U.S.—U.S. v. Quattrone, 402 F.3d 304 (2d Cir. 2005).
Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).

8 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).

9 U.S.—Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 981. Collecting or gathering information for news or journalism

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2085 to 2121

The First Amendment guaranty of freedom of speech and press generally allows the press to gather or collect information lawfully and from proceedings in open court or public records but does not entail rights greater than the rights of the general public.

The press or news media have a protected First Amendment constitutional right to access trials and judicial proceedings,[1] but the press or news media engaged in gathering news about judicial proceedings have no greater rights than the general public,[2] and that right is only a right to sit, listen, watch, and report.[3] The generally applicable "experience and logic" test for determining the constitutionally permissible scope of access to court proceedings[4] and judicial records or documents[5] applies to the news media and press as well as to the general public.[6] Restrictions or limitations on First Amendment rights as interfering with the administration of justice may apply only if the access by the press will influence the proceedings or threaten the integrity of the judicial system.[7]

Court exhibits.

The courts have recognized an array of factors to be considered in permitting the media access to inspect and copy exhibits in a particular case.[8]

Footnotes

1 §§ 971, 972.

2 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978).
Cal.—People v. Dixon, 148 Cal. App. 4th 414, 56 Cal. Rptr. 3d 33 (4th Dist. 2007).
N.Y.—Courtroom Television Network LLC v. State of New York, 5 N.Y.3d 222, 800 N.Y.S.2d 522, 833 N.E.2d 1197 (2005).

3 U.S.—Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978).
Right to attend and observe
U.S.—U.S. v. Dimora, 862 F. Supp. 2d 697 (N.D. Ohio 2012).

4 § 971.

5 § 973.

6 § 972.

7 § 965.

8 U.S.—U.S. v. Dimora, 862 F. Supp. 2d 697 (N.D. Ohio 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 982. Collecting or gathering information for news or journalism—Electronic or photographic recording

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2099, 2118

The First Amendment guaranty of free speech and press generally does not entail rights to electronically or photographically record court proceedings.

The First Amendment guaranty of freedom of speech and press, generally allowing the press to gather or collect information lawfully and from proceedings in open court or public records,[1] does not support a right to electronically or photographically record court proceedings.[2] As a newspaper reporter is not allowed to bring a typewriter or printing press into the courtroom, the electronic media is not allowed to bring cameras and recording devices.[3] However, audio or video recording may be allowed pursuant to valid court rules regulating the practice,[4] as may require the court to balance enumerated factors, denying a request only if there is a likelihood of harm arising from the coverage.[5]

CUMULATIVE SUPPLEMENT

Cases:

State resident failed to satisfy the injury-in-fact requirement for standing to challenge the constitutionality of county's court-ordered ban on electronic recording devices in county government center based on resident's alleged intention to use such devices to record trial activities and other activities of public interest occurring in the governmental center, even assuming that the ban arguably implicated constitutional interests, where there was no showing of credible threat of enforcement of the ban. McKay v. Federspiel, 823 F.3d 862 (6th Cir. 2016).

Under strict scrutiny standard, Idaho Statute prohibiting a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the conduct of an agricultural production facility's operations, violated First Amendment's free speech protections; statute was under-inclusive in that, even if Idaho had compelling governing interest in protecting property and privacy, statute prohibited only audio or video recordings and did not prohibit photographs, and statute was over-inclusive and suppressed more speech than necessary to further the goals in that there were various other laws at Idaho's disposal that would allow it to achieve its stated interests while burdening little or no speech. U.S. Const. Amend. 1; Idaho Code Ann. § 18-7042(1)(d). Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

Under strict scrutiny standard, Idaho Statute prohibiting a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the conduct of an agricultural production facility's operations, violated First Amendment's free speech protections; statute was under-inclusive in that, even if Idaho had compelling governing interest in protecting property and privacy, statute prohibited only audio or video recordings and did not prohibit photographs, and statute was over-inclusive and suppressed more speech than necessary to further the goals in that there were various other laws at Idaho's disposal that would allow it to achieve its stated interests while burdening little or no speech. U.S. Const. Amend. 1; Idaho Code Ann. § 18-7042(1)(d). Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 § 981.

2 U.S.—Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981); Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); McKay v. Federspeil, 22 F. Supp. 3d 731 (E.D. Mich. 2014).
Cal.—People v. Dixon, 148 Cal. App. 4th 414, 56 Cal. Rptr. 3d 33 (4th Dist. 2007).
Mass.—Com. v. Winfield, 464 Mass. 672, 985 N.E.2d 86 (2013).
No right to television cameras in courtroom
Va.—Virginia Broadcasting Corp. v. Com., 286 Va. 239, 749 S.E.2d 313 (2013).
A.L.R. Library
Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.
Use in state court by counsel or party of tape recorder or other electronic device to make transcript of criminal trial proceedings, 67 A.L.R.3d 1013.

3 U.S.—Estes v. State of Tex., 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).

4 U.S.—Hollingsworth v. Perry, 558 U.S. 183, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010); Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981).
Cal.—People v. Dixon, 148 Cal. App. 4th 414, 56 Cal. Rptr. 3d 33 (4th Dist. 2007).
Mass.—Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).

5 Ariz.—Star Pub. Co. v. Bernini, 228 Ariz. 490, 268 P.3d 1147 (Ct. App. Div. 2 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 983. Confidentiality privilege of journalist

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2073, 2074

The First Amendment guaranty of free speech and press provides a basis for a journalist's personal qualified privilege to withhold confidential sources or confidential information, subject to limitations.

The First Amendment guaranty of free speech and press provides a basis for a journalist's personal qualified privilege to withhold confidential sources or confidential information,[1] applicable in both civil[2] and criminal matters,[3] but the privilege is not absolute[4] and is generally inapplicable to matters of first-hand observation as a witness to events.[5]

People seeking the protection of the federal journalist's privilege under the First Amendment must show that they: (1) are engaged in investigative reporting, (2) are gathering news, and (3) possess the intent at the inception of the news-gathering process to disseminate this news to the public.[6]

In civil cases, the privilege does not dissolve solely because the information sought by a litigant is not confidential information, in the sense that the information is readily available,[7] since regardless of the character of the information, the disclosure seeks to examine the reportorial and editorial processes.[8]

In determining the appropriate balance between a litigant's interest in the information sought, and the public's interest in protecting a report's First Amendment privilege, courts apply a three-part test: (1) the court must determine whether the information sought is central to the litigant's case, (2) the court must determine whether the litigant has exhausted alternative sources of information,[9] and (3) the court must draw a distinction between civil cases in which the reporter is a party and ones in which the reporter is not,[10] such that when the journalist is a party, and successful assertion of the privilege will effectively shield the journalist from liability, the equities weigh somewhat more heavily in favor of disclosure.[11]

Qualifications to the privilege may apply in defamation actions.[12]

Footnotes

1 U.S.—Price v. Time, Inc., 416 F.3d 1327, 67 Fed. R. Evid. Serv. 906 (11th Cir. 2005), as modified on other grounds on denial of reh'g, 425 F.3d 1292 (11th Cir. 2005) (applying Alabama law); Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005); In re Slack, 768 F. Supp. 2d 189 (D.D.C. 2011).
N.J.—Too Much Media, LLC v. Hale, 206 N.J. 209, 20 A.3d 364 (2011).
N.Y.—People v. Novak, 41 Misc. 3d 749, 971 N.Y.S.2d 853 (County Ct. 2013).
Tex.—Nelson v. Pagan, 377 S.W.3d 824 (Tex. App. Dallas 2012).
Telephone records protected
U.S.—The New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).
Not recognized
Mass.—Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367, 822 N.E.2d 667 (2005).
A.L.R. Library
Reportorial privilege as to nonconfidential news information, 60 A.L.R.5th 75 (§§ 3 to 11, First Amendment basis of privilege).
Privilege of newsgatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

2 N.Y.—People v. Novak, 41 Misc. 3d 749, 971 N.Y.S.2d 853 (County Ct. 2013).

3 § 984.

4 U.S.—Price v. Time, Inc., 416 F.3d 1327, 67 Fed. R. Evid. Serv. 906 (11th Cir. 2005), as modified on other grounds on denial of reh'g, 425 F.3d 1292 (11th Cir. 2005) (applying Alabama law); In re Slack, 768 F. Supp. 2d 189 (D.D.C. 2011).
N.Y.—People v. Novak, 41 Misc. 3d 749, 971 N.Y.S.2d 853 (County Ct. 2013).

5 U.S.—U.S. v. Sterling, 724 F.3d 482 (4th Cir. 2013), cert. denied, 134 S. Ct. 2696, 189 L. Ed. 2d 739 (2014).
Vt.—Spooner v. Town of Topsham, 182 Vt. 328, 2007 VT 98, 937 A.2d 641 (2007).

6 U.S.—In re Madden, 151 F.3d 125, 49 Fed. R. Evid. Serv. 1106 (3d Cir. 1998).
N.J.—Too Much Media, LLC v. Hale, 206 N.J. 209, 20 A.3d 364 (2011) (recognizing rule).

7 U.S.—In re Slack, 768 F. Supp. 2d 189 (D.D.C. 2011); In re Subpoena to Goldberg, 693 F. Supp. 2d 81 (D.D.C. 2010).

8 U.S.—In re Subpoena to Goldberg, 693 F. Supp. 2d 81 (D.D.C. 2010).

9 U.S.—Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005); In re Subpoena to Goldberg, 693 F. Supp. 2d 81 (D.D.C. 2010).
Tex.—Nelson v. Pagan, 377 S.W.3d 824 (Tex. App. Dallas 2012).

10 U.S.—Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005); In re Subpoena to Goldberg, 693 F. Supp. 2d 81 (D.D.C. 2010).

11 U.S.—In re Subpoena to Goldberg, 693 F. Supp. 2d 81 (D.D.C. 2010).

12 U.S.—Price v. Time, Inc., 416 F.3d 1327, 67 Fed. R. Evid. Serv. 906 (11th Cir. 2005), as modified on other grounds on denial of reh'g, 425 F.3d 1292 (11th Cir. 2005) (applying Alabama law).
Tex.—Nelson v. Pagan, 377 S.W.3d 824 (Tex. App. Dallas 2012).
Factors considered
W. Va.—State ex rel. Lincoln Journal, Inc. v. Hustead, 228 W. Va. 17, 716 S.E.2d 507 (2011).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

1. Speech Restrictions Applicable to Judicial Proceedings; Access, Participation, and Reporting

d. News Media Reporting, Disseminating, or Collecting Information

§ 984. Confidentiality privilege of journalist—Criminal matters

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2073, 2074

The First Amendment guaranty of free speech and press provides a basis for a journalist's personal qualified privilege to withhold confidential sources or confidential information in criminal matters, subject to limitations.

A journalist's personal qualified privilege to withhold confidential sources or confidential information under the First Amendment freedom of the press clause is applicable in criminal matters in some jurisdictions,[1] but not in others,[2] and there is no privilege if it is shown that a crime has been committed and that the journalist possesses relevant information not available from other sources.[3] A privilege does not apply in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such nonlegitimate motive, even though the reporter promised confidentiality to a source.[4]

The privilege must yield to the government's right to investigate and prosecute crime and to the accused's rights of defense, due process, and a fair trial.[5] The First Amendment does not protect news journalists from disclosing to a grand jury information they have received in confidence.[6]

The First Amendment gives no privilege to journalists to refuse to reveal confidential information and sources in a criminal prosecution to the court for in camera consideration to determine whether the information must be revealed to the accused to be used in preparing a defense.[7]

Footnotes

1 U.S.—U.S. Commodity Futures Trading Com'n v. McGraw-Hill Companies, Inc., 390 F. Supp. 2d 27, 68 Fed. R. Evid. Serv. 497 (D.D.C. 2005).
N.Y.—People v. Novak, 41 Misc. 3d 749, 971 N.Y.S.2d 853 (County Ct. 2013).

2 Tex.—In re Rabb, 293 S.W.3d 865 (Tex. App. Dallas 2009).

3 U.S.—Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).
Rule applied to EEOC proceedings
U.S.—University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571, 57 Ed. Law Rep. 666, 28 Fed. R. Evid. Serv. 1169, 15 Fed. R. Serv. 3d 369 (1990).
Rule applied to special prosecutor proceedings
U.S.—In re Special Proceedings, 373 F.3d 37, 64 Fed. R. Evid. Serv. 768 (1st Cir. 2004).

4 U.S.—U.S. v. Sterling, 724 F.3d 482 (4th Cir. 2013), cert. denied, 134 S. Ct. 2696, 189 L. Ed. 2d 739 (2014).
Participant in charged offenses
D.C.—U.S. v. Libby, 432 F. Supp. 2d 26 (D.D.C. 2006).

5 N.Y.—People v. Nasser, 15 Misc. 3d 499, 830 N.Y.S.2d 892 (Sup 2007).

6 U.S.—Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); In Re Grand Jury Subpoenas, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

7 U.S.—U.S. v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988).

16B C.J.S. Constitutional Law § 985

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

a. Public Forum Analysis and Standards

§ 985. General principles

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730 to 1751

The protection and enforcement of First Amendment principles of free speech and expression are applicable to public property, subject to varying levels of regulation or restriction based on the nature of the property and its use as a public forum or nonpublic forum.

Speech at a public place on a matter of public concern cannot be restricted simply because it is upsetting or arouses contempt or because society finds the idea itself offensive or disagreeable.[1] The government may not exclude from public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express.[2]

Under the prevailing constitutional framework, speech restrictions imposed on government-owned property are analyzed under a forum-based approach that divides government property into three categories:[3] the traditional public forum, i.e., government property which has traditionally been available for public expression;[4] the designated public forum, i.e., governmental property

which has been expressly dedicated to speech activity;[5] and the nonpublic forum.[6] The existence of a right of access to public property for speech and the standard by which limitations on that right must be evaluated differ depending on the character of the property.[7] When property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all, for purposes of First Amendment analysis.[8]

CUMULATIVE SUPPLEMENT

Cases:

A public place adjacent to a public street occupies a special position in terms of First Amendment protection of speech. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Speech at a public place on a matter of public concern cannot be restricted simply because it is upsetting or arouses contempt, because if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Regulation of speech on government property that has traditionally been available for public expression or has been designated as a public forum is subject to the highest scrutiny, but limitations on expressive activity on other types of public property so-called non-public fora are subject to much more limited review. U.S. Const. Amend. 1. L. F. v. Lake Washington School District #414, 947 F.3d 621 (9th Cir. 2020).

City's regulation restricting sellers using authorized selling spaces at public farmer's market, held inside park, to market-related solicitation was reasonable and viewpoint-neutral regulation, and therefore did not violate First Amendment. U.S. Const. Amend. 1. Mahgerefteh v. City of Torrance, 324 F. Supp. 3d 1121 (C.D. Cal. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

2 U.S.—Wood v. Moss, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014).

3 U.S.—Byrne v. Rutledge, 623 F.3d 46 (2d Cir. 2010); Galena v. Leone, 638 F.3d 186 (3d Cir. 2011); McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).

4 § 987.

5 § 988.

6 § 989.

7 U.S.—Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983).

8 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

16B C.J.S. Constitutional Law § 986

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§ 986. Public forum standards

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730, 1733 to 1747

The First Amendment guaranty of free speech and expression allows reasonable restrictions of time, place, and manner in a public forum, whether the forum is traditional or dedicated, but content-based restrictions are subject to strict scrutiny and viewpoint-based restrictions are prohibited.

The guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a public forum.[1] Government regulation of the time, place, and manner of speech in a public forum may be reasonable if content-neutral.[2] Any content-based restriction of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest,[3] as applies to political speech in a public forum,[4] or the exclusion of particular speakers,[5] and the restrictions must leave ample alternative channels for communication.[6] Restrictions based on viewpoint are prohibited.[7] The standards apply with equal force to traditional public forums and designated public forums.[8]

A listener's probable reaction to a speech is not a content-neutral basis for regulating speech in a public forum.[9]

General criteria for public forum determinations.

Public facilities are not public forums solely by reason of public ownership and support by tax money[10] or the mere physical characteristics of the property.[11] A public forum need not be a physical place and includes both a televised debate among candidates for political office, sponsored by a public broadcaster,[12] and a charity drive aimed at federal employees.[13]

CUMULATIVE SUPPLEMENT

Cases:

When the government provides a forum for speech, known as a public forum, the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content. U.S. Const. Amend. 1. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 (2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).
A.L.R. Library
Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum, 70 A.L.R.6th 513.

2 U.S.—Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009); U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).
Applies to fully protected speech
U.S.—Hunt v. City of Los Angeles, 638 F.3d 703 (9th Cir. 2011).

3 U.S.—Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009); International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).
Cal.—Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007).

4 U.S.—Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995); Boos v. Barry, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988).

5 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

6 U.S.—Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

7 U.S.—Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009).

8 U.S.—Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009); International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983).

9 U.S.—Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

10 U.S.—U. S. Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981).

11 U.S.—U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990).

12 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

13 U.S.—Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

a. Public Forum Analysis and Standards

§ 987. Traditional forum status

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730, 1737 to 1739

A traditional public forum, within the protection and enforcement of the First Amendment guaranty of free speech and expression, is a public place traditionally or historically available for public expression.

For purposes of the elevated First Amendment standards for speech restraints applicable to public forums,[1] a public forum may be a traditional public forum,[2] meaning government property which has traditionally been available for public expression.[3] A traditional public forum is one that, by long tradition, has been devoted to assembly and debate.[4] A property of this nature does not lose its historically recognized character because it abuts government property that has been dedicated to some other use than as a forum for public expression and is not transformed by being included by the government in a statutory description of the adjoining parcel.[5]

Traditional public forums include municipal streets,[6] sidewalks,[7] and parks,[8] a municipal theater or auditorium,[9] the sidewalks surrounding the grounds of the Supreme Court,[10] the street in front of the White House,[11] and, in general, sidewalks, streets,

and parks that the public has historically used for assembly and general communication,[12] or that have been, by long tradition or by government fiat, devoted to assembly and debate.[13]

A traditional public forum is a type of property that has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and historically and traditionally has been used for expressive conduct.[14] A public place adjacent to a public street occupies a special position in terms of First Amendment protection of speech; public streets are the archetype of a traditional public forum for First Amendment purposes.[15]

CUMULATIVE SUPPLEMENT

Cases:

A street or a park is a quintessential forum for the exercise of First Amendment free speech rights. U.S.C.A. Const.Amend. 1. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

Public streets are the archetype of a traditional public forum, for purposes of First Amendment protection of speech. U.S.C.A. Const.Amend. 1. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Parks and sidewalks are traditionally considered public fora, for purposes of the First Amendment. U.S.C.A. Const.Amend. 1. Cutting v. City of Portland, Maine, 802 F.3d 79 (1st Cir. 2015).

A "traditional public forum" is a street, sidewalk, or park, or some other type of public property that like a street, sidewalk, or park has for a very long time been used for expressive activity, such as marches, picketing, and leafleting. U.S. Const. Amend. 1. Women's Health Link, Inc. v. Fort Wayne Public Transportation Corp., 826 F.3d 947 (7th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 § 986.

2 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990); McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).

3 U.S.—U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990).

4 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012); Bays v. City of Fairborn, 668 F.3d 814 (6th Cir. 2012); Mahoney v. Doe, 642 F.3d 1112 (D.C. Cir. 2011).

5 U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

6 U.S.—Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

7 U.S.—Marcavage v. City of New York, 689 F.3d 98 (2d Cir. 2012), cert. denied, 133 S. Ct. 1492, 185 L. Ed. 2d 548 (2013).

8 U.S.—Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002); Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

9 U.S.—Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

10 U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

11 U.S.—Mahoney v. Doe, 642 F.3d 1112 (D.C. Cir. 2011).

12 U.S.—U.S. v. Marcavage, 609 F.3d 264, 70 A.L.R.6th 753 (3d Cir. 2010); McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).

Cal.—International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 48 Cal. 4th 446, 106 Cal. Rptr. 3d 834, 227 P.3d 395 (2010).

Public way or sidewalk near abortion locations

U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

City owned and operated park

U.S.—Occupy Fort Myers v. City of Fort Myers, 882 F. Supp. 2d 1320 (M.D. Fla. 2011).

A.L.R. Library

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction, 71 A.L.R.6th 471.

Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum, 70 A.L.R.6th 513.

13 U.S.—McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).

14 U.S.—Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006).

15 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

a. Public Forum Analysis and Standards

§ 988. Designated forum status; limited purpose

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730, 1741 to 1747

A designated public forum, within the protection and enforcement of the First Amendment guaranty of free speech and expression, is a public place which the government has expressly dedicated to speech activity but may include dedications for limited purposes or uses.

For purposes of the elevated First Amendment standards for speech restraints applicable to public forums,[1] a public forum may be a designated public forum, meaning governmental property which has been expressly dedicated to speech activity.[2] The government is free to open properties for expressive use by the general public or by a particular class of speakers, thereby creating a designated public forum.[3]

Designated public forums are created by purposeful governmental action; the government does not create a designated public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional public forum for public discourse.[4] To create a designated public forum, the government must intend to make the property generally available to a class

of speakers; a designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.[5]

In determining whether a forum is a designated open public forum, the factors to be considered are the governmental intent, the extent of the use granted, and the consistency in granting or refusing access to the forum.[6] Governmental intent and access policy, as well as the purpose of a forum, are the touchstones for differentiating between designated public forums and nonpublic forums.[7] In any event, the existence of a designated public forum is not shown by the fact that members of the public are permitted to go and come at will on particular publicly owned or operated property although this general openness may be a factor in a determination that there is a public forum.[8]

A general policy of open access does not vanish when the government adopts a specific restriction on speech because the government's policy is indicated by its consistent practice, not each exceptional regulation that departs from the consistent practice.[9]

Limited purpose or use.

A designated public forum may be created for a limited purpose[10] or limited use.[11] When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint and must be reasonable in light of the purpose served by the forum.[12] Restrictions on access to a limited public forum must be reasonable and viewpoint neutral.[13] A designated limited public forum is a nonpublic forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain subjects.[14] Speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.[15]

CUMULATIVE SUPPLEMENT

Cases:

When a unit of government creates a limited public forum for private speech, in either a literal or metaphysical sense, some content-based and speaker-based restrictions may be allowed, but even in such cases, viewpoint discrimination is forbidden. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1. Matal v. Tam, 137 S. Ct. 1744 (2017).

The First Amendment forbids the state to exercise viewpoint discrimination in either a limited or designated public forum, even when the limited public forum is one of its own creation. U.S. Const. Amend. 1. Robinson v. Hunt County, Texas, 921 F.3d 440 (5th Cir. 2019).

A "limited forum" denotes a public facility limited to the discussion of certain subjects or reserved for some types or classes of speaker, such as an open space in a state university in which members of the university community and their guests, but not uninvited outsiders, are allowed to give talks. U.S. Const. Amend. 1. Women's Health Link, Inc. v. Fort Wayne Public Transportation Corp., 826 F.3d 947 (7th Cir. 2016).

State establishes limited public forum by opening property limited to use by certain groups or dedicated solely to discussion of certain subjects, but when state creates limited public forum, it is nonetheless prohibited by the First Amendment's right to

free speech from exercising viewpoint discrimination. U.S. Const. Amend. 1. Business Leaders In Christ v. University of Iowa, 991 F.3d 969 (8th Cir. 2021).

Unlike a designated public forum, a limited public forum cannot, by definition, be open to the public at large for discussion of any and all topics; and a limited public forum differs from a designated public forum in this respect because a designated public forum grants general access to the designated class of speakers, while a limited public forum can be set up to grant only selective access to that class. U.S. Const. Amend. 1. Barrett v. Walker County School District, 872 F.3d 1209 (11th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 § 986.

2 U.S.—U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990).

3 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).
Municipality's public libraries
U.S.—Doe v. City of Albuquerque, 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012).

4 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985); McGlone v. Bell, 681 F.3d 718, 280 Ed. Law Rep. 607 (6th Cir. 2012).
Opened to public at large
U.S.—Bloedorn v. Grube, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).
Open house at Air Force base insufficient
U.S.—U.S. v. Albertini, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985).

5 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).
Unlimited designated forum
U.S.—Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006).

6 U.S.—Gregoire v. Centennial School Dist., 907 F.2d 1366, 61 Ed. Law Rep. 845 (3d Cir. 1990).

7 N.Y.—Make The Road by Walking, Inc. v. Turner, 378 F.3d 133 (2d Cir. 2004).

8 U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); Bloedorn v. Grube, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).

9 U.S.—OSU Student Alliance v. Ray, 699 F.3d 1053, 286 Ed. Law Rep. 83 (9th Cir. 2012), cert. denied, 134 S. Ct. 70, 187 L. Ed. 2d 29 (2013).

10 U.S.—Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010); Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001); Galena v. Leone, 638 F.3d 186 (3d Cir. 2011).
Student newspaper and journal as limited public forum
U.S.—Husain v. Springer, 494 F.3d 108, 223 Ed. Law Rep. 41 (2d Cir. 2007).
Public library as limited public forum
U.S.—Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (3d Cir. 1992).

11 U.S.—Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009).

12 U.S.—Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).

13 U.S.—Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).

14 U.S.—Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006).

15 U.S.—Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001).

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16B C.J.S. Constitutional Law § 989

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

a. Public Forum Analysis and Standards

§ 989. Nonpublic forum status; reasonableness standard

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730, 1749 to 1751

A nonpublic forum, within the protection of the First Amendment guaranty of free speech and expression for reasonable restrictions the time, place, and manner of speech, is a public place not traditionally used for or expressly dedicated to speech activity.

For purposes of the elevated First Amendment standards for speech restraints applicable to public forums,[1] when government property is not a traditional public forum and the government has not dedicated it to First Amendment activity, reasonable restrictions on speech are permitted with respect to the time, place, and manner of speech,[2] and a regulation restricting the uses of the property is examined only for reasonableness.[3]

A reasonableness inquiry must give due consideration to the degree and character of the impairment of protected expression involved, discounted by any mitigating alternatives that remain to the aggrieved party, and weighed in the balance against the impairment.[4] Regulations other than mere time, place, and manner restrictions, in order to be reasonable, must be designed to

reserve the forum for its intended purposes, and the overall assessment of reasonableness must be undertaken with an eye to the intended purposes and of the ways in which the regulated conduct might actually interfere with the carrying out of those purposes.[5] The government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or only reasonable limitation.[6] The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message.[7]

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral.[8] Avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum, and the First Amendment does not forbid the viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.[9] A speaker may be excluded from a nonpublic forum if the speaker wishes to address a topic not encompassed within the purpose of the forum or if the speaker is not a member of the class of speakers for whose especial benefit the forum was created,[10] but the government violates the First Amendment when it denies access to the speaker solely to suppress the point of view to be espoused on an otherwise includible subject.[11] The regulation on speech cannot suppress expression merely because public officials oppose the speaker's view.[12]

Internet access.

Internet access in public libraries is neither a traditional nor a designated public forum.[13]

CUMULATIVE SUPPLEMENT

Cases:

Government's decision to restrict access to nonpublic forum need only be reasonable to comply with First Amendment; it need not be the most reasonable or the only reasonable limitation. U.S.C.A. Const.Amend. 1. Reza v. Pearce, 806 F.3d 497 (9th Cir. 2015).

A content-based restriction of speech in a nonpublic forum is reasonable under the Free Speech Clause when it is wholly consistent with the government's legitimate interest in preserving the property for the use to which it is lawfully dedicated. U.S. Const. Amend. 1. Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215 (11th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 986.

2 U.S.—Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983).

3 U.S.—Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007); International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992); Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County, 653 F.3d

290 (3d Cir. 2011); Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School Dist., 640 F.3d 329, 267 Ed. Law Rep. 466 (8th Cir. 2011); Oberwetter v. Hilliard, 639 F.3d 545 (D.C. Cir. 2011).

4 U.S.—The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority, 597 F.3d 570 (4th Cir. 2010).

5 U.S.—The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority, 597 F.3d 570 (4th Cir. 2010).

6 U.S.—Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985); Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School Dist., 640 F.3d 329, 267 Ed. Law Rep. 466 (8th Cir. 2011).

7 U.S.—Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985); Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School Dist., 640 F.3d 329, 267 Ed. Law Rep. 466 (8th Cir. 2011).

8 U.S.—Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

9 U.S.—Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

10 U.S.—Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

11 U.S.—Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

12 U.S.—Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School Dist., 640 F.3d 329, 267 Ed. Law Rep. 466 (8th Cir. 2011); Oberwetter v. Hilliard, 639 F.3d 545 (D.C. Cir. 2011).

13 U.S.—U.S. v. American Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003).
As to Internet communication or activity as speech, see § 1040.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 990. Charitable solicitations; begging or panhandling

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730 to 1751, 1758 to 1767, 1871, 1880

Appeals or solicitations for charitable purposes, including activities characterized as begging or panhandling, are within the protection of the First Amendment guaranty of free speech and expression in public places, subject to regulation or restriction under applicable constitutional standards for forum analysis.

Charitable appeals for funds in streets or similar places involve a variety of speech interests within the protection of the First Amendment guaranty of free speech and press, including communication of information, dissemination and propagation of views and ideas, and advocacy of causes.[1] The regulation of solicitations of this nature may avoid invalidity for undue interference with freedom of speech if is reasonable, serves a legitimate governmental interest, and is narrowly tailored to serve the governmental interests it seeks to promote,[2] based on a forum analysis for the varying standards applicable to a public or nonpublic forum.[3]

A city ordinance, prohibiting the solicitation of contributions on streets and highways poses an invalid restriction on free speech in public places, failing the test as a reasonable restriction on the time, place, or manner of protected speech in the absence

of content-based restrictions, despite the city's argument favoring a reasonable narrowing construction in its application to solicitations causing motorists to stop in traffic, since the ordinance contains no such limitations and thus is not narrowly tailored to achieve city's interest in promoting traffic flow and safety.[4]

An antisolicitation ordinance, banning panhandlers and other solicitors from orally asking passersby for cash after dark in any public place, is not narrowly drawn to achieve its legitimate purpose in promoting safety in its public areas after dark, if it is content-neutral, since the ban applies without regard to whether the request is made in an abusive, aggressive, or intimidating manner and does not distinguish between solicitations that occur in dark alleyways and solicitations that take place in well-lit street corners.[5]

Valid restrictions may apply to begging in a mass transit system,[6] begging and panhandling in a city subway system,[7] panhandling in public roadways and traffic medians,[8] and the solicitation of charitable contributions inside an airport terminal, determined not to constitute a public forum for speech.[9]

Loitering provisions.

A statute criminalizing loitering for the purpose of begging violates the First Amendment because the State's asserted interests in maintaining public order and safety can be sufficiently served by less destructive measures.[10]

CUMULATIVE SUPPLEMENT

Cases:

Statement by city councilman, at city council meeting, that he did not know who stops there to give them anything in the middle of traffic as it's going, was insufficient to support finding that city adopted facially content-neutral ordinance making it illegal for any person to sit or stand in or on any median of less than 36 inches for any period of time because of disagreement with content of panhandlers' speech, weighing against finding that regulation was not content neutral under First Amendment; statement said nothing about content of panhandler's speech. U.S. Const. Amend. 1. Evans v. Sandy City, 944 F.3d 847 (10th Cir. 2019).

Question asked by city councilman, at city council meeting, as to whether homeless people would be given citations, was insufficient to support finding that city adopted facially content-neutral ordinance making it illegal for any person to sit or stand in or on any median of less than 36 inches for any period of time because of disagreement with content of panhandlers' speech, weighing against finding that regulation was not content neutral under First Amendment; at most, question revealed one council member acknowledged the ordinance would have an incidental effect on panhandling. U.S. Const. Amend. 1. Evans v. Sandy City, 928 F.3d 1171 (10th Cir. 2019).

City ordinance making it illegal for any person to sit or stand in or on any median of less than 36 inches for any period of time left ample alternative channels for panhandler to effectively communicate with his target audiences, i.e., drivers in vehicles, and thus ordinance did not violate First Amendment; roughly 7,000 linear feet of wide, paved medians in the city remained unaffected by the ordinance, and panhandler's target audience was indistinguishable on affected and unaffected medians. U.S. Const. Amend. 1. Evans v. Sandy City, 928 F.3d 1171 (10th Cir. 2019).

City ordinance that prohibited physical interaction between a pedestrian and occupants of a motor vehicle in operation on the roadway when the vehicle is not legally parked was not narrowly tailored to advance city's stated goal of public safety of all pedestrians, motorists, and occupants of vehicles, and thus, ordinance could not withstand constitutional scrutiny in panhandler's First Amendment free speech action; ordinance was underinclusive, applying only to certain pedestrians, even though no one is safe in a roadway no matter the reason for being there, and it was geographically over-inclusive, applying citywide, even

though city provided no evidence that physical interaction between pedestrians and vehicles presented same level of risk to pedestrian safety on each and every street and roadway within city limits. U.S. Const. Amend. 1. Rodgers v. Stachey, 382 F. Supp. 3d 869 (W.D. Ark. 2019).

Provision of city ordinance prohibiting panhandling from half-hour before sunset to half-hour after sunrise was not necessary to serve compelling governmental interest in public safety, and thus provision's content-based speech regulation failed to survive strict scrutiny on First Amendment challenge; none of the alleged instances of aggressive panhandling that were city's stated impetus for provision occurred at night. U.S. Const. Amend. 1. Browne v. City of Grand Junction, 136 F. Supp. 3d 1276 (D. Colo. 2015).

City ordinance prohibiting "panhandling while at any time before, during, or after the solicitation knowingly approaching within five feet of the solicited person" was content based on its face, and thus was subject to strict scrutiny in free speech challenge by individuals who regularly panhandled on public sidewalks in city; ordinance was not a generally applicable regulation of conduct, rather, its application hinged on the message communicated. U.S. Const. Amend. 1. Norton v. City of Springfield, 324 F. Supp. 3d 994 (C.D. Ill. 2018).

City ordinance that prohibited aggressive panhandling was not the least restrictive means available to promote the safety and welfare of the public and was duplicative of existing criminal laws and therefore did not survive strict scrutiny under First Amendment free speech clause in city residents' and school committee member's action challenging ordinance, despite fact that city cited evidence regarding number of instances of aggressive panhandling and the possibility that an individual known to aggressively panhandle may have been fatally struck by a motor vehicle while panhandling; evidence cited by city was insufficient to distinguish it from similar ordinances that failed to survive strict scrutiny. U.S. Const. Amend. 1. Thayer v. City of Worcester, 144 F. Supp. 3d 218 (D. Mass. 2015).

City ordinance prohibiting aggressive panhandling, i.e., aggressive solicitation of any item of value through a request for an immediate donation, in all areas of city, was content-based regulation of activity in public fora, and thus subject to strict scrutiny under First Amendment; ordinance distinguished between some solicitations and others based on the content of that solicitation. U.S. Const. Amend. 1. McLaughlin v. City of Lowell, 140 F. Supp. 3d 177 (D. Mass. 2015).

Town ordinance, which prohibited persons standing within or near a public right-of-way from stopping vehicles to solicit work, and drivers from stopping to solicit employees, regulated more speech than was necessary to advance government's interest in promoting free flow of traffic, both on streets and sidewalks, and there were less speech-restrictive alternatives available, and ordinance was thus unconstitutional under First Amendment; ordinance did not contain specific intent element or requirement that the attempt to stop result in traffic congestion, the obstruction of other vehicles, or double parking, and it applied to all streets and roadways in the town regardless of traffic flow. U.S.C.A. Const.Amend. 1. Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 128 F. Supp. 3d 597 (E.D. N.Y. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980); Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976); Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015).
Peaceful begging or panhandling protected
Ariz.—State v. Boehler, 228 Ariz. 33, 262 P.3d 637 (Ct. App. Div. 1 2011).
N.Y.—People v. Griswold, 13 Misc. 3d 560, 821 N.Y.S.2d 394 (N.Y. City Ct. 2006).

2 U.S.—Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980); Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015).
Ariz.—State v. Boehler, 228 Ariz. 33, 262 P.3d 637 (Ct. App. Div. 1 2011).
N.Y.—People v. Gonzalez, 29 Misc. 3d 928, 908 N.Y.S.2d 848 (N.Y. City Crim. Ct. 2010).

3 §§ 985 to 989.

4 U.S.—Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011).
Valid restrictions at traffic-controlled intersections
U.S.—Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613 (5th Cir. 2007).

5 Ariz.—State v. Boehler, 228 Ariz. 33, 262 P.3d 637 (Ct. App. Div. 1 2011).

6 D.C.—McFarlin v. District of Columbia, 681 A.2d 440 (D.C. 1996).
N.Y.—People v. Schrader, 162 Misc. 2d 789, 617 N.Y.S.2d 429 (N.Y. City Crim. Ct. 1994).

7 N.Y.—People v. Gonzalez, 29 Misc. 3d 928, 908 N.Y.S.2d 848 (N.Y. City Crim. Ct. 2010).

8 U.S.—Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014).

9 U.S.—International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).
Repetitive, in-person, immediate payment solicitations
U.S.—International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 764 F.3d 1044 (9th Cir. 2014).

10 N.Y.—People v. Hoffstead, 28 Misc. 3d 16, 905 N.Y.S.2d 736 (App. Term 2010).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 991. Commercial speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730 to 1751, 1755, 1758 to 1761, 1871

Appeals or solicitations for commercial purposes, constituting commercial speech, are within the protection of the First Amendment guaranty of free speech and expression in public places, subject to regulation or restriction under applicable constitutional standards for forum analysis.

Appeals or solicitations for lawful commercial purposes, constituting commercial speech, are within the protection of the First Amendment guaranty of free speech and expression in public places,[1] subject to regulation or restriction under applicable constitutional standards for forum analysis on the basis of whether the location, as a public place, constitutes a public or nonpublic forum.[2]

Restrictions on the use of public property for commercial purposes do not violate the First Amendment's guaranty applicable to commercial speech if the restrictions are content-neutral, viewpoint neutral, narrowly tailored to serve a significant governmental interest, and provide ample alternative channels for commerce.[3] The restrictions imposed need not be the least

restrictive alternative available but must employ a reasonable fit between the restriction and the interests to be served.[4] A municipal order that news racks containing "commercial handbills" be removed from city streets does not constitute a reasonable time, place, or manner restriction on protected speech since the order is not content-neutral in excepting news racks containing "newspapers."[5]

Within the stated constitutional constraints, municipal regulations may restrict commercial activities on public beaches, requiring permits, insurance, and damage indemnification agreements;[6] may restrict boardwalk vending to vendors holding proper permits, in the city's interests to decrease visual clutter and provide a clear passageway;[7] may restrict vending along a municipal river-walk and in a specific downtown area, advancing the city's interests in safety and aesthetics in a manner no more extensive than necessary;[8] and may restrict public commercial auctions and advertising in defined residential areas.[9]

While a city may not discriminate between speakers or viewpoints, it may value one category of commercial speech over another when it has valid reasons for doing so and is free to value a controlled and harmonious streetscape without compromising its ability to restrict uncontrolled and obtrusive commercial activity on the city's arterial road network.[10]

The National Park Service may validly impose a content-neutral regulation prohibiting merchandise sales within the National Capital Region, excepting books, newspapers, leaflets, pamphlets, buttons, and bumper stickers.[11]

An ordinance prohibiting the solicitation of business on city's streets and highways left open alternative avenues of communication, for purposes of determining whether the ordinance was a valid time, place, manner restriction, since it permitted solicitations from people on sidewalks or in similar public forums.[12]

CUMULATIVE SUPPLEMENT

Cases:

New York State Office of General Services (OGS) and New York State Racing Association (NYRA) engaged in viewpoint discrimination when they denied owner's application to participate as food vendor in Empire State Plaza Summer Outdoor Lunch Program and terminated its status as vendor at Saratoga Race Course because it branded its truck and products with ethnic slurs, use of which was "offensive" and not "family friendly," and therefore such discrimination was subject to, and failed, heightened scrutiny under First Amendment, irrespective of whether owner's speech was categorized as commercial speech, speech in public forum, or speech in nonpublic forum. U.S. Const. Amend. 1. Wandering Dago, Inc. v. Destito, 879 F.3d 20 (2d Cir. 2018).

Permit fee of $100 for conducting commercial photography in village park was not excessive, as would violate First Amendment free speech clause; amount of permit fee, which correlated to expenses incurred for an officer, was reasonably related to legitimate goal of assuring safety and enjoyment of park by all its users, and amount of fee was not variable, so danger of discretionary abuse by permitting authority was absent. U.S. Const. Amend. 1. Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 195 F. Supp. 3d 1065 (E.D. Mo. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012).

2 §§ 985 to 989.

3 U.S.—Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388, 54 Ed. Law Rep. 61 (1989); Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012).
N.J.—State v. Chepilko, 405 N.J. Super. 446, 965 A.2d 190 (App. Div. 2009).
In-street solicitation ban as traffic safety interest
U.S.—Valle Del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013).

4 U.S.—Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388, 54 Ed. Law Rep. 61 (1989).
Colo.—Denver Pub. Co. v. City of Aurora, 896 P.2d 306 (Colo. 1995).

5 U.S.—City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

6 U.S.—Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012).

7 U.S.—Hunt v. City of Los Angeles, 638 F.3d 703 (9th Cir. 2011).
Boardwalk hawking, peddling, or vending ban
N.J.—State v. Chepilko, 405 N.J. Super. 446, 965 A.2d 190 (App. Div. 2009).

8 U.S.—John v. City of San Antonio, 336 Fed. Appx. 411 (5th Cir. 2009).

9 U.S.—Jim Gall Auctioneers, Inc. v. City of Coral Gables, 210 F.3d 1331 (11th Cir. 2000).

10 U.S.—Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010).

11 U.S.—ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949 (D.C. Cir. 1995).

12 U.S.—Comite de Jornaleros de Redondo Beach v. City Of Redondo Beach, 607 F.3d 1178 (9th Cir. 2010), on reh'g en banc, 657 F.3d 936 (9th Cir. 2011).

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16B C.J.S. Constitutional Law § 992

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 992. Picketing, protesting, or demonstrating

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730 to 1771, 1851, 1871

Picketing, marching, or demonstrating constitute speech or expression within the protection of the First Amendment guaranty of free speech and expression in public places, subject to regulation or restriction under applicable constitutional standards based on the nature of the forum.

Peaceful picketing,[1] marches, or demonstrations in appropriate public places for the purpose of political advocacy or protest amount to protected speech under the First Amendment and cannot be validly stopped by the government,[2] or punished in the absence of violations of valid regulations,[3] but the protections are lost when demonstrations become violent.[4]

The forum analysis standards for the regulation or restraint of protected speech in public places[5] apply to public picketing, protests, marches, demonstrations, and like activities constituting protected speech,[6] permitting proper restraints applicable in a residential area,[7] regulating picketing on public streets,[8] regulating the location of picketers on public sidewalks,[9] regulating picketing based on interference with public buildings or property,[10] restraints applicable to the site of a public arena,[11] or

regulations on parades in a content-neutral manner.[12] A statute cannot, however, validly penalize a person's activity in standing in a particular public place in contravention of those standards even if the statute on its face says nothing about speech.[13]

An emergency order can validly prohibit access to portions of a city's downtown area during an international trade conference when the restriction is content-neutral, narrowly tailored to serve the significant governmental interest in maintaining public order, and reasonable in its limitations on time, place, and manner of restriction.[14]

Permit requirements.

The First Amendment does not preclude requiring permits for conducting a parade or procession on a public street[15] provided the issuance of a permit is a mere ministerial routine[16] and provided sufficient reasonable standards are imposed for the requirement.[17] A requirement for parade permit applicants to pay the city's costs of traffic control and clean-up is valid if reasonable as a time, place, and manner restriction even in the absence of an exception on hardship grounds.[18] An indemnification requirement incident to the granting of a permit to march on state highways is not narrowly tailored to the State's interests in protecting itself from loss and exposes applicants to an unknown amount of liability by requiring the defense of all third-party claims.[19] An ordinance which allows a government administrator to vary the permit fee to reflect the estimated cost of maintaining public order violates the right to free speech.[20] An ordinance fee may be sustained when it is not subject to discretionary waiver,[21] but a discretionary waiver of a fee in the application of an ordinance does not necessarily constitute viewpoint discrimination.[22]

CUMULATIVE SUPPLEMENT

Cases:

Criminal conduct allegedly ordered by protest organizer was not protected by the First Amendment, where organizer allegedly ordered demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway. U.S. Const. Amend. 1. Doe v. Mckesson, 945 F.3d 818 (5th Cir. 2019).

State troopers' action in requiring protesters to protest in designated protest zone within state fairgrounds, which was limited public forum, was reasonable in light of the purpose served by the forum, and thus placement of protesters in the protest zone did not violate their First Amendment free speech rights; protesters did not submit timely application to protest as required under the Kentucky State Fair regulations, and in protest zone protesters could speak, hold signs, have megaphones, and convey message to anyone and everyone entering event they sought to protest. U.S. Const. Amend. 1. Hartman v. Thompson, 931 F.3d 471 (6th Cir. 2019).

District court, in proceeding seeking preliminary injunction, abused its discretion in concluding that protesters were likely to succeed on the merits of their First Amendment challenge to the lack of an exigency provision in regulation prohibiting protests at airport without first obtaining a permit, which was required to be submitted at least seven days prior to the commencement of the activity; airport was a nonpublic forum, and thus, appropriate question was whether restriction was reasonable in light of the purpose of the forum, and evidence did not support district court's conclusion that city and police would be able to adequately prepare for a protest at airport with only 24 hours' advance notice. U.S. Const. Amend. 1. McDonnell v. City and County of Denver, 878 F.3d 1247 (10th Cir. 2018).

Regulatory set-aside for presidential inaugural committee of portions of sidewalks and plaza along presidential inaugural parade route, pursuant to National Park Service regulation, which authorized inaugural committee to construct and administer ticketed bleacher viewing and access areas, was content-neutral and justified without reference to the content of expression, and thus was

subject to intermediate scrutiny under the First Amendment; regulation made no reference at all to speech, let alone the content of speech, but, rather, permitted spectator bleachers and a cluster of non-speech functions at park along inaugural parade route in service of the inaugural celebration, and only indirectly regulated where demonstrations could occur by displacing them from that area. U.S. Const. Amend. 1; 36 C.F.R. § 7.96(g)(4)(iii). A.N.S.W.E.R. Coalition (Act Now to Stop War and End Racism) v. Basham, 845 F.3d 1199 (D.C. Cir. 2017).

City's requirement that street preachers, who believed that homosexuality was a sin, move their counter-protest to a gay pride festival off permitted plaza area and to an adjacent public sidewalk outside the permitted area, did not unconstitutionally restrict preachers' First Amendment free speech rights; while preachers may have wanted to preach on permitted festival grounds instead of on the perimeter, city did not have to allow their rights to trump those of festival organizer, which also had expressive message it wanted to share and communicate at festival for which it had obtained a permit, and preachers' message was still heard by passers by on the sidewalk, as preachers continued to share their message with bullhorns for four to five hours during the festival. U.S. Const. Amend. 1. McGlone v. Metropolitan Government of Nashville, 272 F. Supp. 3d 1030 (M.D. Tenn. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

2 U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).
A.L.R. Library
Validity, construction, and application of state or local enactments regulating parades, 80 A.L.R.5th 255.

3 U.S.—Cox v. State of La., 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).
Words not tending to violence
U.S.—Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973).

4 U.S.—Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

5 §§ 985 to 989.

6 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (applying Massachusetts law); Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Ross v. Early, 746 F.3d 546 (4th Cir. 2014), cert. denied, 135 S. Ct. 183, 190 L. Ed. 2d 129 (2014); Bell v. City of Winter Park, Fla., 745 F.3d 1318 (11th Cir. 2014).
Standards for prior restraints
U.S.—National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977).

7 U.S.—Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).
Invalid restraints on residential picketing
U.S.—Carey v. Brown, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980).
Invalid restraints on picketing near school
U.S.—Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972).
A.L.R. Library
Validity, Construction, and Operation of Statute or Regulation Forbidding, Regulating, or Limiting Peaceful Residential Picketing, 113 A.L.R.5th 1.

8 U.S.—Edwards v. City of Coeur d'Alene, 262 F.3d 856 (9th Cir. 2001).

9 U.S.—Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008).

10 U.S.—Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968); Cox v. State of La., 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).
Senate or House office buildings
D.C.—Tetaz v. District of Columbia, 976 A.2d 907 (D.C. 2009).

11 U.S.—Marcavage v. City of New York, 689 F.3d 98 (2d Cir. 2012), cert. denied, 133 S. Ct. 1492, 185 L. Ed. 2d 548 (2013).

Performance facility restriction invalid

U.S.—Kuba v. 1-A Agr. Ass'n, 387 F.3d 850 (9th Cir. 2004).

12 U.S.—Service Employees Intern. Union, Local 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010).

Parade ordinance not content neutral

U.S.—Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

Parade ordinance lacked standards

U.S.—Seattle Affiliate of Oct. 22nd Coalition to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle, 550 F.3d 788 (9th Cir. 2008).

13 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (applying Massachusetts law).

14 U.S.—Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005).

15 U.S.—Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

16 U.S.—Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953).

17 U.S.—Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).

18 U.S.—Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir. 2007).

19 U.S.—iMatter Utah v. Njord, 980 F. Supp. 2d 1356 (D. Utah 2013).

20 U.S.—Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

21 U.S.—International Women's Day March Planning Committee v. City of San Antonio, 619 F.3d 346 (5th Cir. 2010).

22 U.S.—Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir. 2007).

End of Document

16B C.J.S. Constitutional Law § 993

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 993. Picketing, protesting, or demonstrating—Abortion clinic protests

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730 to 1771, 1854

Under the First Amendment guaranty of free speech, restrictions may validly apply to activities in the nature of picketing, marching, or protesting that interfere with access to abortion clinics or services.

The Freedom of Access to Clinic Entrances Act (FACE), under which the government may impose civil and criminal penalties on anyone who by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with any person because that person is or has been, or in order to intimidate such person or any other person or any class person or any class of persons from, obtaining or providing reproductive health services[1] is valid under the First Amendment as narrowly drawn,[2] and both content-neutral[3] and viewpoint-neutral, and thus subject only to intermediate level scrutiny for reasonableness.[4] Although the activities of protesters blocking abortion clinics has expressive content, the Act does not violate First Amendment free speech rights because it furthers important government interest in ensuring access to lawful services, condemns only the noncommunicative impact of conduct within its reach, and leaves open nonviolent, nonobstructive avenues

for protestors to express antiabortion message, including voice, signs, handbills, symbolic gestures, and other expressive means.[5] The government interest furthered by the Act is unrelated to any incidental suppression of free expression.[6]

A state statute cannot validly make it a crime to knowingly stand on a public way or sidewalk near an entrance or driveway to any place, other than a hospital, where abortions are performed, since the provision restricts access to traditional public forums.[7] A statute prohibiting persons from knowingly approaching within eight feet of an individual who is within 100 feet of a health care facility entrance, for purposes of passing leaflets or handbills, unless the individual consents to that approach, does not impose an unconstitutional prior restraint on speech.[8]

A content-neutral injunction may validly restrict the speech of antiabortion protestors in relation to their activities outside clinics, when necessary to serve significant government interests,[9] and is not an unlawful prior restraint on free speech if alternative channels of communication are left open to protestors, particularly when the injunction is predicated on their prior unlawful conduct.[10]

A restriction placed on a nonpublic forum by preventing abortion protestors from standing on a handicapped access ramp leading to facility where abortions are performed is reasonable and not a content-based or viewpoint based effort to block expression.[11]

CUMULATIVE SUPPLEMENT

Cases:

City ordinance prohibiting knowingly congregating, patrolling, picketing, or demonstrating within 20 feet of health care facilities was not content based, and thus, strict scrutiny did not apply to anti-abortion activists' claim that ordinance violated their right to free speech; demonstrating and picketing in ordinance referred to manner in which expressive activity occurred not its content, ordinance did not prohibit sidewalk counseling or other peaceful one-on-one conversations thus obviating need for law enforcement to examine message's content to determine infraction, and ordinance's goals of preventing violent confrontations and de-escalating tense situations were content neutral. U.S. Const. Amend. 1. Reilly v. City of Harrisburg, 790 Fed. Appx. 468 (3d Cir. 2019).

Allegations by anti-abortion "sidewalk counselors" were sufficient to state claim that city "buffer zone" ordinance, which prohibited knowingly picketing or demonstrating within 15 feet of health care facilities, was not narrowly tailored to serve the city's interests and was thus unconstitutional under the intermediate scrutiny standard for content-neutral restraints on speech; counselors alleged that the ordinance imposed a significant burden on speech, in that it prohibited them from effectively reaching their intended audience and made it more difficult for them to engage in sidewalk counseling and other expressive activities, and the city failed to demonstrate that it had tried less-restrictive alternatives or that such alternatives were examined and ruled out for good reason. U.S. Const. Amend. 1. Bruni v. City of Pittsburgh, 824 F.3d 353 (3d Cir. 2016).

Freedom of Access to Clinic Entrances Act (FACE), relating to access to abortion clinics, did not exceed Congress's power under Commerce Clause; FACE regulated activity which was economic in nature, Congress documented at length the economic effect of clinic violence and obstruction, and Congress had rational basis for concluding that national restriction on clinic violence and obstruction was appropriate to protect economic welfare of clinics, their employees, and their customers, though FACE contained no express jurisdictional element involving interstate activity that might limit its reach. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 248. United States v. Dillard, 184 F. Supp. 3d 999 (D. Kan. 2016).

Soundness of tenets of spiritual religion Falun Gong was not relevant to whether it was to be deemed a "religion" for purposes of practitioners' action against opposition group for civil rights conspiracy and violations of Freedom of Access to Clinic Entrances

Act (FACEA). 18 U.S.C.A. § 248; 42 U.S.C.A. § 1985(3). Zhang Jingrong v. Chinese Anti-Cult World Alliance, 311 F. Supp. 3d 514 (E.D. N.Y. 2018).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 248(a)(1).

2 U.S.—American Life League, Inc. v. Reno, 47 F.3d 642, 134 A.L.R. Fed. 735 (4th Cir. 1995); U.S. v. Wilson, 154 F.3d 658 (7th Cir. 1998); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996).
A.L.R. Library
Validity, construction, and application of Freedom of Access to Clinic Entrances Act (FACE) (18 U.S.C.A. sec. 248), 134 A.L.R. Fed. 507.

3 U.S.—Norton v. Ashcroft, 298 F.3d 547, 2002 FED App. 0257P (6th Cir. 2002); U.S. v. Wilson, 154 F.3d 658 (7th Cir. 1998).
Comparable state statute is valid
U.S.—Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997) (applying North Carolina law).
Comparable city ordinance is valid
U.S.—Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir. 1997), as amended (Aug. 1, 1997) (applying Arizona law).

4 U.S.—U.S. v. Wilson, 154 F.3d 658 (7th Cir. 1998).

5 Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996).
Restriction reasonably related to goal
U.S.—U.S. v. Turner, 44 F.3d 900 (10th Cir. 1995).

6 U.S.—Norton v. Ashcroft, 298 F.3d 547, 2002 FED App. 0257P (6th Cir. 2002).

7 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (applying Massachusetts law).
A.L.R. Library
Validity, Construction, and Application of State Statutes and Municipal Ordinances or Orders Providing Buffer Zones Around Health Care Facilities That Offer Abortion Services, 62 A.L.R.6th 359.

8 U.S.—Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).

9 U.S.—Schenck v. Pro-Choice Network Of Western New York, 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994).

10 U.S.—Schenck v. Pro-Choice Network Of Western New York, 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997).

11 U.S.—McTernan v. City of York, Penn., 577 F.3d 521 (3d Cir. 2009).

16B C.J.S. Constitutional Law § 994

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 994. Distributing literature or written material

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730 to 1771, 1871

The First Amendment guaranty of free speech and expression protects the right to distribute literature to the public, and the right of the public to receive it, subject to regulation or restriction under applicable constitutional standards for forum analysis.

The First Amendment guaranty of free speech and expression embraces the right to distribute literature to the public in a public place, and the right to receive it,[1] and the right is not diminished by the sale of written materials advocating or stating a point of view.[2] Handing out leaflets advocating a politically controversial viewpoint is the essence of First Amendment expression, and no form of speech is entitled to greater constitutional protection.[3]

The government cannot completely bar the distribution of religious or political literature on streets, sidewalks, and public places,[4] and the right of distribution may not be withdrawn,[5] whether to ensure identifying the source of the material,[6] avoiding a minor nuisance,[7] or avoiding an invasion of privacy.[8]

Generally, the First Amendment forum analysis standards for the regulation or restraint of protected speech in public places[9] apply to the regulation or restraint of speech by the distribution of literature or written materials,[10] such as regulations of the time, place, and manner of distributions of written materials in public places,[11] applying to restrict distributions on city streets,[12] in public roads,[13] on public sidewalks,[14] on city buses,[15] on Postal Service property,[16] courthouse grounds,[17] a state capitol building,[18] and in municipal airports.[19]

Regulations or restrictions may be supported by the government's interest in the peace, good order, and comfort of the community;[20] interests in regulating crowd safety, convenience, traffic, and congestion in the limited space of state fairgrounds;[21] or interests in maintaining clean streets, as supporting a ban against throwing literature in the streets.[22]

An ordinance may validly prohibit the distribution of newspapers, magazines, handbills, flyers, or similar materials on city streets by persons who step into the road to reach the occupants of motor vehicles, when it leaves open adequate alternative channels of communication by distribution that is not in the road—as on the sidewalks, door-to-door, news boxes, or mail—and is a reasonable content-neutral time, place, and manner restriction of the road as a traditional public forum.[23] In contrast, a law cannot validly prohibit the distribution of written materials within 1,000 feet of a municipal sports center without leaving adequate alternative channels of communication to the specific audience targeted—namely the fans of a particular professional sports team.[24]

Permit or license.

The right to distribute literature may not be made dependent on a license or permit to be issued by an official who can deny it at will,[25] but permit requirements may suffice as reasonable time, place, and manner restrictions if content-neutral and narrowly tailored to the government interest served.[26]

CUMULATIVE SUPPLEMENT

Cases:

Policy restricting leafleting and similar activities in plaza area outside of University arena, which was a government-owned nonpublic forum, was a reasonable restriction in light of plaza's intended uses and purposes, where plaza area was specifically included in the premises leased by arena tenants, who generally used it for commercial activity, facilitating safe and orderly access to arena, and security screening, leafleting and other similar activities amid large crowds of people could have impeded the flow of traffic and endangered safety of arena patrons, and persons seeking to engage in prohibited activities could do so on adjacent sidewalk without causing same safety issues. U.S. Const. Amend. 1. Ball v. City of Lincoln, Nebraska, 870 F.3d 722 (8th Cir. 2017).

Irreparable injury, balance of equities, and public interest did not weigh in favor Catholic Archdiocese on its motion for preliminary injunction in action against metropolitan transit authority alleging that guideline prohibiting advertisements that promoted or opposed any religion, religious practice, or belief violated First Amendment. U.S. Const. Amend. 1. Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, 897 F.3d 314 (D.C. Cir. 2018).

City's willfully blind deference to exclusive use permittees' unfettered discretion to suppress speech for any reason at open-to-the-public event at traditional public forum, and city's decision to enforce trespass violations, targeted religious leafleter's speech, similar to heckler's veto, such that religious leafleter was substantially likely to prevail on § 1983 claim that policy was not reasonable time, place, or manner restriction on speech, but rather was impermissible viewpoint discrimination in violation

of First Amendment, as would support granting of preliminary injunction against city to refrain from arresting leafleter during event; policy and practice to ban literature distribution, regardless of content, by anyone who did not pay to rent booth was post hoc rationalization. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. McMahon v. City of Panama City Beach, 180 F. Supp. 3d 1076 (N.D. Fla. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

2 U.S.—Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981).

3 U.S.—McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

4 U.S.—Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).
Airport terminal leafleting bar invalid
U.S.—Lee v. International Soc. for Krishna Consciousness, Inc., 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992).
Ban on religious fund raising invalid
U.S.—Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943); Jamison v. State of Tex., 318 U.S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943).
Ban on leafleting at public mall invalid
U.S.—American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003).

5 U.S.—Jamison v. State of Tex., 318 U.S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943); Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

6 U.S.—Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960).
Anonymous pamphleteering permitted
U.S.—McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

7 U.S.—Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).
Litter
U.S.—Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

8 U.S.—Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

9 §§ 985 to 989.

10 U.S.—Lee v. International Soc. for Krishna Consciousness, Inc., 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981).
National Park restrictions invalid
U.S.—Boardley v. U.S. Dept. of Interior, 615 F.3d 508 (D.C. Cir. 2010).
Lincoln Center restrictions valid
U.S.—Hotel Employees & Restaurant Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Department of Parks & Recreation, 311 F.3d 534 (2d Cir. 2002).
Prior restraint standards
U.S.—New England Regional Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002).

11 U.S.—Lee v. International Soc. for Krishna Consciousness, Inc., 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981).

12 U.S.—Contributor v. City of Brentwood, Tenn., 726 F.3d 861 (6th Cir. 2013).
Gated communities restricted public streets
U.S.—Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus, 634 F.3d 3 (1st Cir. 2011).

13 U.S.—Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, Mo., 775 F.3d 969 (8th Cir. 2014).

14 U.S.—Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011).

Port authority sidewalks

U.S.—New England Regional Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002).

15 U.S.—Anderson v. Milwaukee County, 433 F.3d 975 (7th Cir. 2006).

16 U.S.—Initiative and Referendum Institute v. U.S. Postal Service, 417 F.3d 1299 (D.C. Cir. 2005).

17 Fla.—Schmidter v. State, 103 So. 3d 263 (Fla. 5th DCA 2012), review denied, 118 So. 3d 221 (Fla. 2013).

18 Mich.—Michigan Up & Out of Poverty Now Coalition v. State, 210 Mich. App. 162, 533 N.W.2d 339 (1995).

19 U.S.—Jews for Jesus, Inc. v. Port of Portland, 172 Fed. Appx. 760 (9th Cir. 2006).

20 U.S.—Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

21 U.S.—Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981).

22 U.S.—Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

23 U.S.—Contributor v. City of Brentwood, Tenn., 726 F.3d 861 (6th Cir. 2013).

Road distribution restriction content-neutral

U.S.—Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, Mo., 775 F.3d 969 (8th Cir. 2014).

24 U.S.—Weinberg v. City of Chicago, 310 F.3d 1029 (7th Cir.2002).

25 U.S.—Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944).

Unfettered discretion to deny

U.S.—American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003).

26 U.S.—Jews for Jesus, Inc. v. Port of Portland, 172 Fed. Appx. 760 (9th Cir. 2006).

Reasonable discretion to revoke permit

U.S.—New England Regional Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002).

State capitol grounds restriction not tailored

U.S.—Parks v. Finan, 385 F.3d 694, 2004 FED App. 0331P (6th Cir. 2004).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 995. Noise or sound amplification

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1730, 1731, 1735, 1756, 1758, 1760, 1840, 1841

The First Amendment guaranty of free speech and expression protects the use of sound or noise amplification in speech but regulations and restrictions are valid when consistent with the applicable constitutional standards under a forum analysis.

Generally, the First Amendment forum analysis standards for the regulation or restraint of protected speech in public places[1] apply to the regulation or restraint of speech by use of sound or noise amplification,[2] including reasonable time, place, or manner restrictions on protected speech,[3] as applied to the government's interest in curbing excessive noise[4] or loud and raucous noises.[5]

A noise level restriction is invalid when it constitutes a "heckler's veto"—meaning an impermissible content-based speech restriction silencing the speaker due to an anticipated disorderly or violent reaction of the audience.[6]

Permits and fees.

An ordinance may validly require a permit for the use of sound amplification devices, provided definite standards are set for the granting of a permit,[7] and the requirements for a permit may include a reasonable fee.[8]

Sound trucks.

Restrictions on sound amplification devices may validly apply to broadcasts of loud and raucous noises by motor vehicles on public streets, as applied to sound trucks,[9] particularly in residential neighborhoods.[10]

CUMULATIVE SUPPLEMENT

Cases:

Anti-abortion activists, who spoke to visitors and patients from public sidewalks outside abortion clinic, failed to state plausible claim that noise provision in city event permit, which required that amplified sound produced by event participants not be plainly audible inside adjacent or nearby buildings, violated First Amendment right of free speech based on allegations that noise provision did not leave ample alternative channels of accomplishing the communication and that abortion rights advocates were permitted to employ loud shouting and cowbells to drown out activists' message, absent allegations that provision prohibited all amplified sound, that provision was included in permit because city officials disapproved of activists' anti-abortion viewpoint, or that other special-event permits did not contain same noise provision. U.S. Const. Amend. 1. Henderson v. McMurray, 987 F.3d 997 (11th Cir. 2021).

[END OF SUPPLEMENT]

Footnotes

1 §§ 985 to 989.

2 U.S.—Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); Costello v. City of Burlington, 632 F.3d 41 (2d Cir. 2011).
Restriction must not be content motivated
U.S.—U.S. v. Marcavage, 609 F.3d 264, 70 A.L.R.6th 753 (3d Cir. 2010).
R.I.—State ex rel. City of Providence v. Auger, 44 A.3d 1218 (R.I. 2012).
Blanket prohibition not narrowly tailored
U.S.—Klein v. City of Laguna Beach, 381 Fed. Appx. 723 (9th Cir. 2010); Hassay v. Mayor, 955 F. Supp. 2d 505 (D. Md. 2013).
A.L.R. Library
Validity of State or Local Enactment Regulating Sound Amplification in Public Area, 122 A.L.R.5th 593.

3 U.S.—Costello v. City of Burlington, 632 F.3d 41 (2d Cir. 2011); Rosenbaum v. City and County of San Francisco, 484 F.3d 1142 (9th Cir. 2007).
D.C.—In re T.L., 996 A.2d 805 (D.C. 2010).
Fla.—Montgomery v. State, 69 So. 3d 1023 (Fla. 5th DCA 2011).
Ga.—Grady v. Unified Government of Athens-Clarke County, 289 Ga. 726, 715 S.E.2d 148 (2011).
Pedestrian mall restrictions not narrowly tailored
U.S.—Deegan v. City of Ithaca, 444 F.3d 135 (2d Cir. 2006).

4 U.S.—Costello v. City of Burlington, 632 F.3d 41 (2d Cir. 2011).
D.C.—In re T.L., 996 A.2d 805 (D.C. 2010).

Or.—State v. Rich, 218 Or. App. 642, 180 P.3d 744 (2008).

5 U.S.—Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

6 U.S.—Rosenbaum v. City and County of San Francisco, 484 F.3d 1142 (9th Cir. 2007).

7 U.S.—Saia v. People of State of New York, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948).

Valid application to street evangelist

U.S.—Rosenbaum v. City and County of San Francisco, 484 F.3d 1142 (9th Cir. 2007).

8 U.S.—U. S. Labor Party v. Codd, 527 F.2d 118 (2d Cir. 1975).

9 U.S.—International Soc. for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority, 691 F.2d 155 (3d Cir. 1982).

10 U.S.—Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R.2d 608 (1949).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 996. Noncommercial signs

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1655 to 1666

Communication by noncommercial signs in public places is a form of speech or expression protected by the First Amendment guaranty of free speech and press but is subject to valid regulations and restrictions under the applicable forum standards.

Noncommercial signs are a form of speech or expression protected by the First Amendment guaranty of free speech and press.[1] Speech or expression by noncommercial signs in public places is subject to valid regulation or restriction consistent with the applicable constitutional standards[2] under a forum analysis.[3] Content-neutral restrictions on noncommercial speech by signage are subject to the intermediate level of constitutional scrutiny for reasonableness of time, place, and manner restrictions while content-based restrictions are subject to strict constitutional scrutiny for narrow tailoring to serve a compelling government interest.[4]

Noncommercial signs may not generally be prohibited on the basis of content, nor may they be excluded if commercial signs are permitted, in the absence of any showing that noncommercial signs are more dangerous to the governmental interest than

commercial signs.[5] Signs carrying noncommercial messages are entitled to a higher degree of free speech protection than those carrying commercial messages[6] and may not be subjected to substantial burdens or abridgement based on content distinctions.[7]

When a regulation of noncommercial signs provides for an application process, it must specify standards for deciding whether to grant or deny permission to post signs, as unbridled discretion amounts to invalid prior restraint.[8]

CUMULATIVE SUPPLEMENT

Cases:

City sign ordinance's exception for public interest messages, including official signs and notices, signs and notices regarding nonprofit service clubs, religious organizations, or charitable associations, and political ideological signs, was not unconstitutionally vague under the First Amendment; although there could be a very narrow category of cases where application of the ordinance would be unclear, it would be clear for the vast majority of its intended applications, and none of mural-painting company's signs were potentially in such a gray area. U.S. Const. Amend. 1. ArchitectureArt, LLC v. City of San Diego, 231 F. Supp. 3d 828 (S.D. Cal. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011); Desert Outdoor Advertising, Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007); XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2004).
Ga.—Fulton County v. Galberaith, 282 Ga. 314, 647 S.E.2d 24 (2007).
Ohio—State v. Spano, 197 Ohio App. 3d 135, 2011-Ohio-6026, 966 N.E.2d 908 (7th Dist. Mahoning County 2011).

2 U.S.—Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011); Desert Outdoor Advertising, Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007).
As to political signs in public places, see § 997.
As to commercial signs in public places, see § 998.
As to residential signs on private property, see § 1001.
Preserving traffic safety and aesthetics
N.Y.—People v. On Sight Mobile Opticians, 24 N.Y.3d 1107, 2 N.Y.S.3d 406, 26 N.E.3d 234 (2014).
Preserving scenic beauty
Tex.—Texas Dept. of Transp. v. Barber, 111 S.W.3d 86 (Tex. 2003).
A.L.R. Library
Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 A.L.R.3d 564.

3 §§ 985 to 989.

4 Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).

5 U.S.—Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006).
Greater noncommercial restrictions invalid
U.S.—Desert Outdoor Advertising, Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007).
N.J.—State v. DeAngelo, 197 N.J. 478, 963 A.2d 1200, 49 A.L.R.6th 729 (2009).

Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).

6 Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).

7 U.S.—XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2004).

8 U.S.—H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 997. Noncommercial signs—Political signs

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1655 to 1666

Communication by political signs in public places is a form of speech or expression protected by the First Amendment guaranty of free speech and expression, subject to restrictions under the applicable standards of a forum analysis.

A regulation of signs that constitutes a content-based restriction on political speech in a public forum is subject to strict constitutional scrutiny and must be narrowly tailored to serve a compelling state interest or it violates the First Amendment.[1] Under the strict scrutiny test, signage regulations imposing significant restrictions on political speech are unconstitutional if lacking a compelling state interest,[2] particularly as applied to restrictions purportedly justified as serving interests in traffic safety, aesthetics, and the protection of property values and neighborhood character.[3] Political signage may not validly be subjected to higher costs or fees under a municipal ordinance based on the sign content as political.[4]

A city ordinance banning all political speech on private bus benches on city sidewalks is not narrowly tailored to serve a compelling state interest and violates the First Amendment, even if the city's interest in maintaining political neutrality is the stated compelling governmental interest, absent any allegation that political advertising on benches will be attributed to the city.[5]

A municipality can bar campaign posters from public property without violating the free-speech rights of political candidates and their supporters if the governing ordinance is neutral in content provided the measure curtails no more speech than is necessary to accomplish its significant government purpose of eliminating visual clutter and provided there are ample alternative modes of communication in the municipality.[6]

CUMULATIVE SUPPLEMENT

Cases:

Police officer's actions in requiring Christian evangelist, who was demonstrating at festival celebrating lesbian, gay, bisexual, and transgender (LGBT) community, to move from public sidewalk immediately adjacent to the festival's entrance to sidewalk across the street were content-based, for First Amendment purposes; officer interpreted festival permit as giving festival organizers the right to close the sidewalk to anyone they viewed as a protester, officer banned evangelist from the sidewalk because of his message, including a large anti-gay sign, evangelical's demonstration was peaceful, and officer effectuated a heckler's veto by his actions on hostile reactions by other festivalgoers. U.S. Const. Amend. 1. Deferio v. City of Syracuse, 306 F. Supp. 3d 492 (N.D. N.Y. 2018).

City's asserted interest in aesthetics was a compelling government interest, for purposes of First Amendment challenge to city's banner sign limitation brought by city resident whose signs were removed for violations of limitation, where city had a population of around 3,000, and city put a central focus on its appearance, beauty, and charm. U.S. Const. Amend. 1. Fanning v. City of Shavano Park, Texas, 429 F. Supp. 3d 320 (W.D. Tex. 2019).

City's interests in traffic safety and aesthetics were directly advanced by sign code, which treated off-premises signs differently from on-premises signs by disallowing use of light-emitting diode (LED) displays for off-premises signs, and thus, code did not violate the First Amendment; code directly and materially advanced the city's stated interests in traffic and aesthetics by restricting the number and types of signs appearing within the city. U.S. Const. Amend. 1. Reagan National Advertising of Austin, Inc. v. City of Cedar Park, 343 F. Supp. 3d 674 (W.D. Tex. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Boos v. Barry, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); Bench Billboard Co. v. City of Toledo, 690 F. Supp. 2d 651 (N.D. Ohio 2010), aff'd, 499 Fed. Appx. 538 (6th Cir. 2012), cert. denied, 133 S. Ct. 1252, 185 L. Ed. 2d 181 (2013).
Invalid size restrictions for political signs
U.S.—Sugarman v. Village of Chester, 192 F. Supp. 2d 282 (S.D. N.Y. 2002).

2 U.S.—Bench Billboard Co. v. City of Toledo, 690 F. Supp. 2d 651 (N.D. Ohio 2010), aff'd, 499 Fed. Appx. 538 (6th Cir. 2012), cert. denied, 133 S. Ct. 1252, 185 L. Ed. 2d 181 (2013).

3 U.S.—XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2004).
Avoiding proliferation not sufficient
U.S.—Sugarman v. Village of Chester, 192 F. Supp. 2d 282 (S.D. N.Y. 2002).

4 U.S.—Lamar Advertising Co. v. City of Douglasville, Georgia, 254 F. Supp. 2d 1321 (N.D. Ga. 2003).

5 U.S.—Bench Billboard Co. v. City of Toledo, 690 F. Supp. 2d 651 (N.D. Ohio 2010), aff'd, 499 Fed. Appx. 538 (6th Cir. 2012), cert. denied, 133 S. Ct. 1252, 185 L. Ed. 2d 181 (2013).

6 U.S.—Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

2. Public Places or Government Property

b. Particular Speech and Regulations in Public Places

§ 998. Commercial signs

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1655 to 1666

Communication by commercial signs in public places is a form of speech or expression protected by the First Amendment guaranty of free speech and expression but is subject to valid regulations and restrictions under the applicable standards of a forum analysis.

Communication by commercial signs is a form of speech or expression protected by the First Amendment guaranty of free speech,[1] but, within the limitations of the applicable First Amendment constitutional standards of a public forum analysis,[2] speech or expression by commercial signs in public places is subject to reasonable regulation or restriction with respect to time, place, and manner.[3] Content-neutral sign regulations, as applied to commercial signs, need only meet a standard of reasonableness in restricting the time, place, and manner of the signage,[4] and may be predicated on government interests in protecting aesthetics and promoting traffic safety.[5]

The principle that commercial speech is afforded less First Amendment protection than noncommercial speech applies in the context of signs in public places,[6] subjecting the content-based regulation of commercial signs to an intermediate level of constitutional scrutiny considering (1) whether the regulated commercial speech concerns a lawful activity and is not misleading; (2) whether the restriction seeks to implement a substantial governmental interest; (3) whether the restriction directly advances that interest; and (4) whether the restriction is no more extensive than is necessary to achieve that interest.[7] If a municipality's determination about how to regulate outdoor commercial signage is reasonable, the court should defer to that determination.[8] If, however, a sign regulation burdens both commercial and noncommercial speech, it may be necessary to analyze it under the standards applicable to both types of speech,[9] thus enabling a party whose purely commercial speech has been sanctioned to assert the noncommercial speech rights of others using the over-breadth doctrine.[10]

Commercial signs may not be so regulated as to grant unfettered discretion to governmental officials[11] or to impair the flow of truthful and legitimate commercial information.[12]

A restriction on the number of commercial sign permits granted annually is a reasonable content-neutral restriction, narrowly tailored to advance an interest in promoting community aesthetics, property values, and vehicular and pedestrian safety, when applicable to all signs.[13]

CUMULATIVE SUPPLEMENT

Cases:

City ordinances that limited advertising signs that could be affixed to motor vehicles, and prohibited non-motorized mobile advertising billboards on public streets, were content neutral, and thus permissible under First Amendment if they were narrowly tailored and left open ample alternative communication channels; ordinances' regulation of "advertising" signs was directed to activity of displaying message to public, not particular content that might be displayed, and there was no suggestion that ordinances applied differently to political endorsements than to commercial speech, for example. U.S. Const. Amend. 1; Cal. Veh. Code §§ 395.5, 21100(m), 21100(p)(2, 3), 22651(v). Lone Star Security and Video, Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016).

Town's zoning ordinance prohibiting electronic signs in district was narrowly tailored to serve significant governmental interests of aesthetics and traffic safety and allowed for reasonable alternative channels of communication, and thus town's denial of Baptist church's request for permit to install electronic sign on its property did not violate church's right to free speech under First Amendment; electronic signs could be garish and worsen aesthetic environment in small community, character of environment affected quality of life and value of property, regulation of electronic signs addressed traffic safety hazards by reducing distractions, regulation was not overinclusive, manually changeable signs were still permitted, and regulation was not underinclusive. U.S. Const. Amend. 1. Signs for Jesus v. Town of Pembroke, NH, 230 F. Supp. 3d 49, 2017 DNH 16 (D.N.H. 2017).

[END OF SUPPLEMENT]

Footnotes

1 N.H.—Carlson's Chrysler v. City of Concord, 156 N.H. 399, 938 A.2d 69 (2007).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

2 §§ 985 to 989.

3 U.S.—H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009).
Wash.—Catsiff v. McCarty, 167 Wash. App. 698, 274 P.3d 1063 (Div. 3 2012), cert. denied, 133 S. Ct. 1470, 185 L. Ed. 2d 365 (2013).

4 U.S.—H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009).
Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).
Wash.—Catsiff v. McCarty, 167 Wash. App. 698, 274 P.3d 1063 (Div. 3 2012), cert. denied, 133 S. Ct. 1470, 185 L. Ed. 2d 365 (2013).

5 N.H.—Carlson's Chrysler v. City of Concord, 156 N.H. 399, 938 A.2d 69 (2007).
Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).
Interests not directly and materially served
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

6 U.S.—Clear Channel Outdoor, Inc. v. Town Bd. of Town of Windham, 352 F. Supp. 2d 297 (N.D. N.Y. 2005).
Ariz.—Salib v. City of Mesa, 212 Ariz. 446, 133 P.3d 756 (Ct. App. Div. 1 2006), as corrected, (May 5, 2006).
Ga.—Fulton County v. Galberaith, 282 Ga. 314, 647 S.E.2d 24 (2007).
Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).
Wash.—Catsiff v. McCarty, 167 Wash. App. 698, 274 P.3d 1063 (Div. 3 2012), cert. denied, 133 S. Ct. 1470, 185 L. Ed. 2d 365 (2013).

7 Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).
Wash.—Kitsap County v. Mattress Outlet/Gould, 153 Wash. 2d 506, 104 P.3d 1280 (2005).

8 U.S.—Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010).

9 Ariz.—Salib v. City of Mesa, 212 Ariz. 446, 133 P.3d 756 (Ct. App. Div. 1 2006), as corrected, (May 5, 2006).
N.Y.—People v. Weinkselbaum, 194 Misc. 2d 19, 753 N.Y.S.2d 284 (App. Term 2002).

10 Ohio—Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484 (2d Dist. Miami County 2010).

11 Mont.—Montana Media, Inc. v. Flathead County, 2003 MT 23, 314 Mont. 121, 63 P.3d 1129 (2003).
Case-by-case determination insufficient
Ga.—Fulton County v. Galberaith, 282 Ga. 314, 647 S.E.2d 24 (2007).

12 Ohio—Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 23 Ohio Op. 3d 462, 433 N.E.2d 198 (1982).
Restricting "for sale" signs to avoid white flight
U.S.—Linmark Associates, Inc. v. Willingboro Tp., 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977).

13 U.S.—Sugarman v. Village of Chester, 192 F. Supp. 2d 282 (S.D. N.Y. 2002).

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16B C.J.S. Constitutional Law § 999

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

3. Private Places or Private Property

§ 999. General standards and restrictions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1780 to 1782

The First Amendment guaranty of free speech and expression applies to speech in private places or on private property but is subject to reasonable time, place, and manner restrictions; greater limitations may apply under a state constitution.

The First Amendment guaranty of free speech and expression is subject to limitations as applied to private places or private property[1] as may be determined under a forum analysis for government imposed limitations as reasonable time, place, and manner restrictions.[2] The general public does not ordinarily have a First Amendment right to access private property to engage in protected speech or expression without the owner's consent provided the private property does not qualify as a public forum.[3]

The private owner of a commercial property, such as a public-access plaza,[4] retail and grocery store,[5] shopping mall,[6] or shopping center is not generally required to permit speech activities on the premises,[7] and may prohibit such activity,[8] imposing reasonable regulations to prohibit conduct calculated to disrupt normal business operations or that would result in obstruction or undue interference with normal business operations.[9] The free speech guaranty does not extend to speech activities on privately owned sidewalks in front of the entrances to stores, including stores in shopping centers.[10]

There is no constitutional right to picket or to counsel in the interior corridors of a privately owned office building[11] or to distribute commercial handbills on a private sidewalk outside a casino or hotel.[12]

A privately owned residential apartment complex is not the functional equivalent of a traditional public forum and is subject to a landlord's ban on the distribution of leaflets.[13]

Restrictions may be applied to the distribution of religious literature in public places within a town or village owned by a private corporation.[14]

State constitutions.

Even though certain privately owned property does not have attributes which require it to be treated as public for the purposes of the speech and press guaranty of the First Amendment to the United States Constitution, it may be subject to a state free speech constitutional provision.[15] Under a broader state constitutional provision, even on private owned commercial property, a content-based restriction is subject to strict scrutiny and must be necessary to serve a compelling interest and be narrowly drawn to achieve that end.[16]

CUMULATIVE SUPPLEMENT

Cases:

Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed, and therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor subject to First Amendment constraints. U.S. Const. Amend. 1. Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, 232 Cal. App. 4th 1171, 181 Cal. Rptr. 3d 577 (5th Dist. 2014).

2 U.S.—International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 764 F.3d 1044 (9th Cir. 2014); Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012).
Cal.—Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach, 232 Cal. App. 4th 1171, 181 Cal. Rptr. 3d 577 (5th Dist. 2014).
N.Y.—Waller v. City of New York, 34 Misc. 3d 371, 933 N.Y.S.2d 541 (Sup 2011).
As to the standards for a forum analysis, generally, see § 989.

3 U.S.—Wright v. Incline Village General Improvement Dist., 665 F.3d 1128 (9th Cir. 2011).

4 U.S.—Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249 (10th Cir. 2005).
N.Y.—Waller v. City of New York, 34 Misc. 3d 371, 933 N.Y.S.2d 541 (Sup 2011).

5 U.S.—Riemers v. Super Target of Grand Forks, Target Corp., 363 F. Supp. 2d 1182 (D.N.D. 2005).
Parking lot not public forum
Kan.—Lingelbach v. Hy-Vee, Inc., 84 P.3d 636 (Kan. Ct. App. 2004), unpublished.

6 Colo.—Robertson v. Westminster Mall Co., 43 P.3d 622 (Colo. App. 2001).

7 U.S.—Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972).

Conn.—United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P., 270 Conn. 261, 852 A.2d 659 (2004).

8 U.S.—PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

9 Cal.—Snatchko v. Westfield LLC, 187 Cal. App. 4th 469, 114 Cal. Rptr. 3d 368 (3d Dist. 2010), as modified on denial of reh'g, (Sept. 3, 2010).

10 Cal.—Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501, 290 P.3d 1116 (2012), cert. denied, 133 S. Ct. 2799, 186 L. Ed. 2d 860 (2013).

Trespass prosecution for protesting

Haw.—State v. Viglielmo, 105 Haw. 197, 95 P.3d 952 (2004).

11 Mass.—Ingram v. Problem Pregnancy of Worcester, Inc., 396 Mass. 720, 488 N.E.2d 408 (1986).

12 Nev.—S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 23 P.3d 243 (2001).

13 Cal.—Golden Gateway Center v. Golden Gateway Tenants Assn., 26 Cal. 4th 1013, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001).

14 U.S.—Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973).

Sidewalk

U.S.—Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

15 U.S.—PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

Expanded rights in shopping malls

Cal.—Prigmore v. City of Redding, 211 Cal. App. 4th 1322, 150 Cal. Rptr. 3d 647 (3d Dist. 2012).

Expanded rights in cooperative apartment complex

N.J.—Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 103 A.3d 249 (2014).

A.L.R. Library

Validity, Under State Constitutions, of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity, 52 A.L.R.5th 195.

16 Cal.—Snatchko v. Westfield LLC, 187 Cal. App. 4th 469, 114 Cal. Rptr. 3d 368 (3d Dist. 2010), as modified on denial of reh'g, (Sept. 3, 2010).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

3. Private Places or Private Property

§ 1000. Door-to-door solicitation, canvassing, or distribution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1780 to 1782

The First Amendment guaranty of free speech and expression applies to speech in the form of door-to-door solicitation and canvassing in private places or on private property, subject to reasonable, content-neutral time, place, and manner restrictions; content-based restrictions must be narrowly drawn to serve a compelling interest.

As a general rule, under the First Amendment guaranty of free speech and expression, political or religious literature may be distributed from door to door in an orderly manner, without interference by state authority, when it does not appear that the literature is against public morals or in any way improper for distribution.[1] A private residence's front door, porch, and mail box areas are public forums for purposes of a law restricting distribution of printed matter.[2] An ordinance may not require individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit on demand.[3]

Nevertheless, governments may enforce reasonable regulations of door-to-door soliciting and canvassing to protect their citizens from crime and undue annoyance so long as the regulations are narrowly drawn and do not vest undefined discretion in officials to determine what message the public will hear.[4] Ordinances may prohibit persons selling subscriptions for periodicals and other publications from going to or on private residences without the invitation of the owner.[5]

CUMULATIVE SUPPLEMENT

Cases:

City demonstrated that its ban on door-to-door solicitation directly and materially advanced the substantial governmental interests of protecting public safety of its residents and well as protecting privacy of residents from uninvited solicitors, as required element of *Central Hudson*, 100 S.Ct. 2343, test for determining whether a statute regulating commercial speech was permissible under First Amendment, where ban was directed to uninvited solicitors and protected homeowners from invited solicitation, city faced significant burglary and home invasion crimes, and ban deterred uninvited individuals from entering private property for purpose of canvassing the premises to perpetuate crime. U.S. Const. Amend. 1. Vivint Louisiana, LLC v. City of Shreveport, 213 F. Supp. 3d 821 (W.D. La. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).
Delivery of publication is protected
Ohio—Reddy v. Plain Dealer Publishing Co., 2013-Ohio-2329, 991 N.E.2d 1158 (Ohio Ct. App. 8th Dist. Cuyahoga County 2013), appeal not allowed, 136 Ohio St. 3d 1559, 2013-Ohio-4861, 996 N.E.2d 986 (2013).

2 U.S.—Distribution Systems of America, Inc. v. Village of Old Westbury, 862 F. Supp. 950 (E.D. N.Y. 1994).

3 U.S.—Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002).

4 U.S.—Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

5 U.S.—Jordan v. De George, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

3. Private Places or Private Property

§ 1001. Residential signs

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1780 to 1782

The First Amendment guaranty of free speech and expression applies to speech in the form of residential signs in private places or on private property, subject to reasonable, content-neutral time, place, and manner restrictions; content-based restrictions must be narrowly drawn to serve a compelling interest.

An ordinance banning all residential signs except those falling within an enumerated exemption violates a homeowner's First Amendment right to free speech when the ordinance totally forecloses a venerable means of communication to political, religious, or personal messages.[1]

A content-neutral ordinance limiting or regulating residential yard signs is valid in relation to the owners' First Amendment rights provided the ordinance satisfies the intermediate scrutiny applicable to such regulations based on the city's significant interests, the narrow tailoring to serve those interests, and open alternative channels of communication.[2] An ordinance imposing a lengthy waiting period for a residential sign permit is an impermissible prior restraint on speech even when justified by legitimate interests in the preservation of aesthetic values.[3]

Footnotes

1 U.S.—City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

2 U.S.—Long Island Bd. of Realtors, Inc. v. Incorporated Village of Massapequa Park, 277 F.3d 622 (2d Cir. 2002); Wagner v. City of Garfield Heights, Ohio, 577 Fed. Appx. 488 (6th Cir. 2014); Hensel v. City of Little Falls, MN, 992 F. Supp. 2d 916 (D. Minn. 2014).

Yard sale signs limited

U.S.—Kennedy v. Avondale Estates, Ga., 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

Reasonable size limitations

Pa.—Spriggs v. South Strabane Tp. Zoning Hearing Bd., 786 A.2d 333 (Pa. Commw. Ct. 2001).

Content-based injunction as prior restraint

Ind.—Mishler v. MAC Systems, Inc., 771 N.E.2d 92 (Ind. Ct. App. 2002).

3 U.S.—Lusk v. Village of Cold Spring, 475 F.3d 480 (2d Cir. 2007).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

a. General Considerations

§ 1002. General protection; applicability of general laws

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2070, 2072

Publishers of newspapers or periodicals are protected by the First Amendment guaranty of free speech and press to the same extent as the public at large but enjoy no additional immunity and are ordinarily subject to provisions of general laws of government.

The First Amendment guaranties of free speech and press protect publishers of newspapers, magazines, or periodicals to the same extent as the public at large.[1] The freedom of the press is a personal right not confined newspapers and periodicals.[2] Publishers enjoy no additional immunity from the application of the general laws and have no special privilege to invade the rights and liberties of others.[3] The application of general laws to the press does not offend the First Amendment[4] and does not require stricter scrutiny than required on the application of general laws to other persons or organizations,[5] but the application of laws to the press in a manner that provides special treatment is subject to constitutional scrutiny.[6]

A newspaper is a business in addition to being a medium for the dissemination of news and opinions, and as such, notwithstanding the protective provisions of the First Amendment, it is subject to provisions of general laws of government,[7] including commercial regulations,[8] economic regulations,[9] antitrust laws,[10] and labor laws.[11]

General regulations are not invalid as applied to the press because they incidentally burden it,[12] but regulations which single out the press for different treatment from other businesses, and which are not justified by some special characteristic of the press, suggest that they have a purpose related to suppression of expression, a goal which is presumptively unconstitutional.[13] Regulations which substantially burden the press are an invalid abridgement of press freedom unless they are the least restrictive means of furthering a governmental interest which outweighs the burden.[14]

The courts must be wary that taxes, regulatory laws, and other laws that impose financial burdens are not used to undermine freedom of press and speech, since the government can attempt to cow the media in general by singling it out for special financial burdens, and it can also seek to control, weaken, or destroy a disfavored segment of the media by targeting that segment.[15] A law presumptively violates the First Amendment if it is structured so as to raise suspicion that it was intended to interfere with protected expression; once the presumption of unconstitutionality arises, it can be overcome only by showing that the challenged law is needed to serve a compelling interest.[16] A compelling justification is required only when the law attempts to single out the press for disfavored treatment.[17]

Footnotes

1 U.S.—Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).
Same rights as other citizens
U.S.—Cooper v. Dillon, 403 F.3d 1208 (11th Cir. 2005).
Protects the newspaper itself
Cal.—Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98 (1st Dist. 2010), as modified on denial of reh'g, (Feb. 24, 2010).

2 U.S.—Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).
N.H.—Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (2010).

3 U.S.—Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967); Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000).
Okla.—Grogan v. KOKH, LLC, 2011 OK CIV APP 34, 256 P.3d 1021 (Div. 2 2011).
No special solicitude for the press
U.S.—Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937 (7th Cir. 2015).

4 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991); Pitt News v. Pappert, 379 F.3d 96, 191 Ed. Law Rep. 57 (3d Cir. 2004); Compuware Corp. v. Moody's Investors Services, Inc., 499 F.3d 520, 2007 FED App. 0336P (6th Cir. 2007).
Md.—Mitchell v. Baltimore Sun Co., 164 Md. App. 497, 883 A.2d 1008 (2005).

5 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991); Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000); Compuware Corp. v. Moody's Investors Services, Inc., 499 F.3d 520, 2007 FED App. 0336P (6th Cir. 2007).

6 U.S.—Animal Legal Defense Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014).

7 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

8 U.S.—Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983).
No right to profitability or viability
U.S.—Pitt News v. Pappert, 379 F.3d 96, 191 Ed. Law Rep. 57 (3d Cir. 2004).

9 U.S.—Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation, 322 F.3d 1298 (11th Cir. 2003).

10 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

11 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991); McDermott v. Ampersand Pub., LLC, 593 F.3d 950 (9th Cir. 2010).

12 U.S.—Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999); In Re Grand Jury Subpoenas, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

13 U.S.—Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); Pitt News v. Pappert, 379 F.3d 96, 191 Ed. Law Rep. 57 (3d Cir. 2004).

14 U.S.—Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983).

15 U.S.—Pitt News v. Pappert, 379 F.3d 96, 191 Ed. Law Rep. 57 (3d Cir. 2004).

16 U.S.—Pitt News v. Pappert, 379 F.3d 96, 191 Ed. Law Rep. 57 (3d Cir. 2004).

17 U.S.—PG Pub. Co. v. Aichele, 902 F. Supp. 2d 724 (W.D. Pa. 2012), decision aff'd, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

a. General Considerations

§ 1003. Gathering of news; access to information

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2070 to 2081

Gathering of news by the press is protected by the First Amendment guaranty of freedom of the press consistent with the rights of the general public and the reasonable restraints imposed by government information sources.

The gathering of news has some protection under the guaranties of freedom of the press in the First Amendment and similar state guaranties,[1] but the protection is not absolute.[2] The right extends to any lawful source,[3] but unlawful news gathering activities are not protected,[4] nor is interference with the rights of private individuals[5] or trespass on private property.[6]

The protection of the press in gathering the news does not entail a right of access to a particular proceeding or place[7] or to all sources of information within the government's control.[8] In general, the rights of access of the press to government proceedings and information are coextensive with the rights of the public.[9] When evaluating whether the press has a right of access to information about government bodies, their processes, and their decisions, the courts apply an "experience and logic" inquiry,

looking to (1) whether the place and process have historically been open to the press and general public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question.[10]

The State's rulemaking power with regard to access of information is not absolute; if the First Amendment is to retain a reasonable degree of vitality, the limitations on access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted, or lesser-restricted, access.[11]

In the ongoing intercourse of government and press, a reporter endures only de minimis inconvenience and has no retaliation claim for exercising free speech rights when a government official denies the reporter access to discretionary information or refuses to answer the reporter's questions because the official disagrees with the substance or manner of the reporter's previous expression in reporting.[12]

Crime news.

The press has a duty and a right to cover crime news and criminal investigations[13] but has no right to information not open to the public.[14]

Footnotes

1 U.S.—Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).
Coextensive in state constitution
Tex.—In re Hearst Newspapers Partnership, L.P., 241 S.W.3d 190 (Tex. App. Houston 1st Dist. 2007).

2 U.S.—U.S. v. Brown, 250 F.3d 907 (5th Cir. 2001).
Cal.—Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 1 Cal. Rptr. 3d 536 (2d Dist. 2003).

3 U.S.—S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553 (6th Cir. 2007).

4 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).
Cal.—Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 1 Cal. Rptr. 3d 536 (2d Dist. 2003).

5 Cal.—Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 1 Cal. Rptr. 3d 536 (2d Dist. 2003).

6 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

7 U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).
As to gathering information from courts or judicial proceedings, generally, see §§ 981, 982.

8 U.S.—Smith v. Plati, 258 F.3d 1167, 155 Ed. Law Rep. 1090 (10th Cir. 2001); Oklahoma Observer v. Patton, 2014 WL 7335317 (W.D. Okla. 2014).
Government may deny access and punish theft
Fla.—Sarasota Herald-Tribune v. State, 916 So. 2d 904 (Fla. 2d DCA 2005).

9 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Glik v. Cunniffe, 655 F.3d 78, 84 A.L.R.6th 647 (1st Cir. 2011); PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).
Tex.—In re Hearst Newspapers Partnership, L.P., 241 S.W.3d 190 (Tex. App. Houston 1st Dist. 2007).
Vt.—Caledonian-Record Pub. Co., Inc. v. Vermont State Colleges, 175 Vt. 438, 2003 VT 78, 833 A.2d 1273, 182 Ed. Law Rep. 550 (2003).
No special right beyond public domain
U.S.—Asociacion de Periodistas de Puerto Rico v. Mueller, 529 F.3d 52 (1st Cir. 2008).

10 U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).

Pa.—Uniontown Newspapers, Inc. v. Roberts, 576 Pa. 231, 839 A.2d 185 (2003).

11 U.S.—S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553 (6th Cir. 2007).

12 U.S.—The Baltimore Sun Co. v. Ehrlich, 437 F.3d 410 (4th Cir. 2006).

13 U.S.—Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

14 U.S.—Herald Co. v. McNeal, 511 F. Supp. 269 (E.D. Mo. 1981).

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16B C.J.S. Constitutional Law § 1004

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

a. General Considerations

§ 1004. Gathering of news; access to information—Equal access

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2070 to 2081

Equal access to information is protected in the gathering of news by the press under the First Amendment guaranty of press freedom, subject to reasonable restraints imposed by government information sources.

If the government permits some agencies of the press to have access to certain records or information, it cannot deny access to other agencies in the absence of some compelling reason for the exclusion.[1] Members of the press have some limited claim to access information when the government attempts to selectively delimit the audience or when the government cooperates in enforcing restrictions on access.[2] Opportunities to cover official news sources must be the same for all accredited news gatherers, meaning not only equal access but also, within reasonable limits, access with equal convenience to news sources.[3] The denial of press credentials to a particular journalist or to the representative of a particular news organization must not be based on the content of the past expression of the journalist or organization[4] and, in any case, must be reasonable[5] and supported by a compelling interest of government promoted by the denial.[6]

Private events.

When a private commercial venture presents a newsworthy event and grants exclusive rights of coverage to a news organization, freedom of the press does not confer an equal right of access on other news organizations even though the event is presented in a facility which is owned and operated by government.[7]

Footnotes

1 U.S.—Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).
Cannot deny one media and allow another
Tex.—Randolph v. Walker, 29 S.W.3d 271 (Tex. App. Houston 14th Dist. 2000).

2 U.S.—S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553 (6th Cir. 2007).

3 U.S.—Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973); Westinghouse Broadcasting Co., Inc. v. Dukakis, 409 F. Supp. 895 (D. Mass. 1976).

4 U.S.—Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977).

5 U.S.—Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).

6 U.S.—Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977).

7 U.S.—Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co., 510 F. Supp. 81 (D. Conn. 1981).

16B C.J.S. Constitutional Law § 1005

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

b. Publishing Newspapers or Periodicals

§ 1005. News or public interest information

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2015, 2077

The First Amendment guaranty of freedom of speech and press protects the right of news or periodical publishers to publish information that is newsworthy, of public interest, truthful, and lawfully obtained, without prior restraint.

The right to publish is firmly embedded in the First Amendment and is central to the constitutional guaranty of free speech and press,[1] including the privilege of truthfully[2] or fairly publishing information,[3] lawfully obtained.[4]

In the reporting or discussion of newsworthy information,[5] and matters of governmental or public interest, publishers engage in an activity protected by the constitution[6] and are not limited to stories on current events but may include entertainment information,[7] the reproduction of past events,[8] and information about people who, by their accomplishments, create a legitimate and widespread attention to their activities constituting a matter of public interest.[9]

A newspaper does not lose the protection of the First Amendment merely because it is operated for a profit or forms part of a profit-making enterprise,[10] and a newspaper is not relegated to the limited protection accorded commercial speech because it provides very little information other than advertising.[11]

Prior restraint.

A prior restraint of publication by a newspaper is presumptively unconstitutional[12] and must be justified by an extraordinary showing of governmental interest in preventing publication of the matter in question.[13] A party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right but also that the prior restraint will be effective and that no less extreme measures are available; designating conduct as an invasion of privacy is not enough.[14]

Footnotes

1 U.S.—McMillan v. Carlson, 369 F. Supp. 1182 (D. Mass. 1973), judgment aff'd, 493 F.2d 1217 (1st Cir. 1974).

2 U.S.—Bartnicki v. Vopper, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001); Bowley v. City of Uniontown Police Dept., 404 F.3d 783 (3d Cir. 2005); Smith v. NBC Universal, 524 F. Supp. 2d 315 (S.D. N.Y. 2007).
Cal.—Paterno v. Superior Court, 163 Cal. App. 4th 1342, 78 Cal. Rptr. 3d 244 (4th Dist. 2008).

3 U.S.—Williams v. Cordillera Communications, Inc., 26 F. Supp. 3d 624 (S.D. Tex. 2014).

4 U.S.—Bartnicki v. Vopper, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001); Bowley v. City of Uniontown Police Dept., 404 F.3d 783 (3d Cir. 2005).
Colo.—People v. Bryant, 94 P.3d 624 (Colo. 2004).

5 U.S.—Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007); Smith v. NBC Universal, 524 F. Supp. 2d 315 (S.D. N.Y. 2007).
Courts reluctant to define "newsworthy"
U.S.—Solano v. Playgirl, Inc., 292 F.3d 1078 (9th Cir. 2002).

6 U.S.—Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); Kois v. Wisconsin, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972); Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201 (11th Cir. 2009); Williams v. Cordillera Communications, Inc., 26 F. Supp. 3d 624 (S.D. Tex. 2014).

7 U.S.—Arenas v. Shed Media U.S. Inc., 881 F. Supp. 2d 1181 (C.D. Cal. 2011), aff'd, 462 Fed. Appx. 709 (9th Cir. 2011).
Cal.—Gates v. Discovery Communications, Inc., 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552 (2004).

8 U.S.—Smith v. NBC Universal, 524 F. Supp. 2d 315 (S.D. N.Y. 2007).

9 U.S.—Yeager v. Cingular Wireless LLC, 673 F. Supp. 2d 1089 (E.D. Cal. 2009); Smith v. NBC Universal, 524 F. Supp. 2d 315 (S.D. N.Y. 2007).

10 U.S.—City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).
N.J.—G.D. v. Kenny, 205 N.J. 275, 15 A.3d 300 (2011).

11 U.S.—Ad World, Inc. v. Doylestown Tp., 672 F.2d 1136 (3d Cir. 1982).

12 U.S.—CBS, Inc. v. Davis, 510 U.S. 1315, 114 S. Ct. 912, 127 L. Ed. 2d 358 (1994); Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).
Most significant First Amendment restriction
N.H.—Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (2010).

13 U.S.—New York Times Co. v. U.S., 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).
Only exceptional cases allow censorship
Fla.—Gagliardo v. Branam Children, 32 So. 3d 673 (Fla. 3d DCA 2010).

14 N.H.—Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (2010).

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§ 1006. Editorial control and discretion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2015, 2077

The First Amendment guaranty of free speech and press protects the right of news or periodical publishers to publish, or not publish, what they choose.

The First Amendment affords a publisher the absolute authority to shape a newspaper's content,[1] and exercise editorial control,[2] including the publisher's choice of writers.[3] Newspapers are not subject to governmental regulation of the choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials, are within the First Amendment guaranty of a free press.[4] To the extent that "journalistic integrity" requires a publisher's cession of some of its editorial control, the First Amendment precludes government coercion in the name of journalistic integrity.[5] Any compulsion by the government of newspapers which requires them to publish that which reason tells them they should not is unconstitutional.[6] A statute cannot constitutionally require newspapers whose columns assail the character of political candidates to grant free space to candidates for a reply.[7]

Footnotes

1 U.S.—Ampersand Pub., LLC v. N.L.R.B., 702 F.3d 51 (D.C. Cir. 2012).

2 U.S.—McDermott v. Ampersand Pub., LLC, 593 F.3d 950 (9th Cir. 2010); Lowe v. Hearst Communications, Inc., 414 F. Supp. 2d 669 (W.D. Tex. 2006), judgment aff'd, 487 F.3d 246 (5th Cir. 2007).
Conn.—Mehdi v. Commission on Human Rights and Opportunities, 144 Conn. App. 861, 74 A.3d 493 (2013).

3 U.S.—McDermott v. Ampersand Pub., LLC, 593 F.3d 950 (9th Cir. 2010).
Cannot order publication of writer
Conn.—Mehdi v. Commission on Human Rights and Opportunities, 144 Conn. App. 861, 74 A.3d 493 (2013).

4 U.S.—Ampersand Pub., LLC v. N.L.R.B., 702 F.3d 51 (D.C. Cir. 2012).
No state compulsion is permitted
Conn.—Mehdi v. Commission on Human Rights and Opportunities, 144 Conn. App. 861, 74 A.3d 493 (2013).
What include and what to exclude
U.S.—Rivoli v. Gannett Co., Inc., 327 F. Supp. 2d 233 (W.D. N.Y. 2004).
Election advice
U.S.—Mills v. State of Ala., 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966).

5 U.S.—Ampersand Pub., LLC v. N.L.R.B., 702 F.3d 51 (D.C. Cir. 2012).

6 U.S.—Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974); National Broadcasting Co., Inc. v. F.C.C., 516 F.2d 1101 (D.C. Cir. 1974).

7 U.S.—Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

b. Publishing Newspapers or Periodicals

§ 1007. Advertising

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2070 to 2081

The First Amendment guaranty of a free speech and press affords judgmental discretion to a newspaper publisher to accept or refuse advertisements and is not distinguishable from the newspaper's discretion in publishing any other content; advertising is commercial speech subject to the lesser standards of protection than noncommercial speech.

Publishers of newspapers have a legitimate protected interest in their advertising content, as in their editorial content, under the First Amendment guaranty of free speech and press.[1] Commercial advertising is commercial speech, however, and thus is subject to lesser standards of First Amendment protections than afforded to noncommercial speech.[2] Any First Amendment interest which might be served by advertising an ordinary commercial proposal, and which might arguably outweigh a governmental interest supporting regulation, is absent when the commercial activity itself is illegal and a restriction on advertising is incidental to valid limitation on economic activity.[3]

Publishers' First Amendment protections in regard to advertising include the refusal of advertisements,[4] without regard to an alleged obligation to publish in the public interest or to afford avenues to political expression,[5] although the right of refusal is qualified and must yield to certain countervailing rights,[6] particularly limitations on the monopolization of advertising and news channels.[7]

The courts will not enjoin the publication of advertising nor compel publication at the suit of a would-be advertiser[8] except when there are grounds for specific enforcement of the newspaper's contract to publish the advertisement.[9]

A court cannot compel the publisher of daily newspaper to accept and print an advertisement in the exact form submitted.[10]

A ban in one jurisdiction on advertisement of services or activities which may not be permissible in the regulating state, but which are legal in other states, is invalid as applied to a publisher of an advertisement in the regulating jurisdiction because it violates the speech interests of a diverse audience, and because it may encourage similar bans in many states, which would severely impair the proper functioning of numerous national publications or interstate newspapers.[11]

Preventing unlawful discrimination.

Government may, in order to combat unreasonable sex discrimination in employment, prohibit the publication of advertisements for jobs not having bona fide male or female qualifications in columns captioned to indicate a preference for male or female employees.[12] The government may apply to newspaper classified advertising a prohibition against publishing any discriminatory notice relating to sale or rental of a dwelling.[13]

Footnotes

1 U.S.—Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975); The Pitt News v. Fisher, 215 F.3d 354, 145 Ed. Law Rep. 173 (3d Cir. 2000).

2 U.S.—Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

A.L.R. Library

Protection of Commercial Speech Under First Amendment—Supreme Court Cases, 164 A.L.R. Fed. 1.

3 U.S.—Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973).

4 U.S.—Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980); Chicago Joint Bd., Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970).

5 U.S.—Chicago Joint Bd., Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970).

6 U.S.—Fitzgerald v. National Rifle Ass'n of America, 383 F. Supp. 162 (D.N.J. 1974).

7 U.S.—Lorain Journal Co. v. U.S., 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951).

8 U.S.—Chicago Joint Bd., Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970); Allston v. Lewis, 480 F. Supp. 328 (D.S.C. 1979), aff'd, 688 F.2d 829 (4th Cir. 1982).

W. Va.—Citizen Awareness Regarding Educ. v. Calhoun County Pub., Inc., 185 W. Va. 168, 406 S.E.2d 65, 68 Ed. Law Rep. 912 (1991).

Securities offerings

U.S.—Person v. New York Post Corp., 427 F. Supp. 1297 (E.D. N.Y. 1977), aff'd, 573 F.2d 1294 (2d Cir. 1977).

9 Ind.—Herald Telephone v. Fatouros, 431 N.E.2d 171 (Ind. Ct. App. 1982).

10 U.S.—Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971).
Wis.—Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co., 92 Wis. 2d 709, 285 N.W.2d 891 (Ct. App. 1979).

11 U.S.—Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

12 U.S.—Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973).

13 U.S.—U.S. v. Hunter, 459 F.2d 205, 22 A.L.R. Fed. 339 (4th Cir. 1972).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

b. Publishing Newspapers or Periodicals

§ 1008. Advertising—Government owned public forum

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2070 to 2081

A First Amendment constitutional public forum analysis applies to restrictions on the advertising content of a government owned newspaper, permitting content-neutral or viewpoint-neutral restrictions on advertising content when reasonable and related specifically to the publisher's purpose.

A First Amendment constitutional public forum analysis[1] applies to restrictions on the advertising content of a government owned newspaper, as applied to a Department of Defense "Civilian Enterprise Newspaper" published commercially for distribution on military installations, thus permitting restrictions on "political" advertising—as related specifically to elections and policy matters of concern to public officials—when reasonable in light of the newspaper's purpose, viewpoint-neutral, and designed to ensure that advertising furthers, or at least does not hinder, the mission of the military command or the military installation.[2] The restriction is not overbroad and vague on its face nor as applied in relation to the rejection of an advertisement purporting to address controversial matters of concern to the President, the Department of Defense (DOD), or Congress, based on prior DOD decisions permitting as nonpolitical an advertisement of a former United States Senator's memoir focusing on the

Senator's military service in World War II, and permitting as nonpolitical an advertisement by the Federal Bureau of Investigation soliciting employees.[3]

Under a public forum analysis, if a forum is determined to be nonpublic, then the State may restrict access to the forum based on the subject matter of the speech and the identity of the speaker as long as the decision is reasonable and is viewpoint-neutral.[4] A state bar journal, as the trade publication of the state bar association, is a nonpublic forum under the applicable public forum analysis, considering that the journal is not established as an open forum for the expressive activities of public, or of all members of the bar, but invites the public to submit articles and advertisements for consideration by the editorial board within framework of editorial discretion necessary to fulfill magazine's purposes, and thus, the journal may apply reasonable regulations restricting access to the journal as a forum, including a refusal to publish an attorney's reply to a report of disciplinary charges against the attorney as a policy rationally related to the journal's aim of foster high ethical standards in the profession and retaining the informational character of the publication.[5]

In contrast, a state bar association, as an agency of the state, publishing a journal that accepts commercial advertising and resolutions of bar committees on political subjects, violates freedom of speech and press by refusing to publish political advertisements based on the political content of the advertisements, in the absence of a compelling reason to restrict the exercise of free speech as a fundamental right—a decision not adequately supported by the bar's interest in its public image.[6]

A state bar association magazine, not constituting a public forum, may refuse an advertisement by a private person for representing by counsel in litigation against local attorneys, applying reasonable restrictions not predicated on content and leaving open alternative channels for communication.[7]

Footnotes

1 §§ 985 to 989.

2 U.S.—Bryant v. Gates, 532 F.3d 888 (D.C. Cir. 2008).

3 U.S.—Bryant v. Gates, 532 F.3d 888 (D.C. Cir. 2008).

4 U.S.—Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371 (5th Cir. 1989).

5 U.S.—Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371 (5th Cir. 1989).

6 U.S.—Radical Lawyers Caucus v. Pool, 324 F. Supp. 268 (W.D. Tex. 1970).

7 U.S.—Allston v. Lewis, 480 F. Supp. 328 (D.S.C. 1979), aff'd without opinion, 688 F.2d 829 (4th Cir. 1982).

16B C.J.S. Constitutional Law § 1009

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

c. Distributing or Delivering Newspapers or Periodicals

§ 1009. General protection and restrictions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2079

The First Amendment guaranty of free speech and press protects the right of newspaper publishers to distribute their newspapers without unreasonable interference by the government.

Circulation and distribution of newspapers is protected by the First Amendment guaranty of free speech and press.[1] The protection extends to the means of distribution as well as to the content[2] and is not lost because the newspaper is sold rather than distributed free of charge.[3]

Under a public forum analysis applicable to public places,[4] the restriction or regulation of newspaper or periodical distribution may be sustained provided the restriction or regulation: (1) serves a significant government interest, (2) is narrowly tailored to that interest, and (3) leaves open adequate alternative channels of communication for the information.[5] Within these standards, an ordinance validly prohibits the sale or distribution of newspapers, magazines, or similar materials on city streets and to the occupants of motor vehicles, when the intended audience of the newspaper and vendors challenging the ordinance is the general

citizenry of the city whom they can easily reach by going door-to-door, by seeking out people on sidewalks, or by distributing the paper via the mail, email, and news boxes.[6] As applied to newspaper vendors, a content-neutral city ordinance that prohibits street vendors' solicitations within roadways at traffic-signal-controlled intersections, but allows solicitations on "surrounding sidewalks and unpaved shoulders," is facially valid under the First Amendment, when the ordinance is narrowly tailored as addressing activity at heavily trafficked and dangerous intersections, and serves a compelling public interest, namely public safety.[7]

A grant of preferential access to a civilian enterprise newspaper selected by the military for distribution on military bases met the reasonableness standard despite the effects on the freedoms of speech and the press.[8]

As applied to a weekly shopper newspaper, a city ordinance cannot validly prohibit the distribution of free printed material in yards, driveways, or porches, when the ordinance is not narrowly tailored to serve city's desire to protect its aesthetic beauty and prevent litter caused by unclaimed weekly shopper newspapers thrown in yards or driveways; the ordinance bans a substantial amount of speech not shown to create litter or destroy the city's beauty, and the city has other ways to prevent litter caused by home delivery of papers without unreasonably infringing on freedom of speech or press.[9] A newspaper, even consisting largely of advertising, is not subject to a prohibition of house-to-house unrequested delivery of advertising materials when the prohibition does not apply to political or religious materials similarly distributed.[10]

Footnotes

1 U.S.—Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613 (5th Cir. 2007); Contributor v. City of Brentwood, Tenn., 726 F.3d 861 (6th Cir. 2013).

2 U.S.—Lauder, Inc. v. City of Houston, Texas, 751 F. Supp. 2d 920 (S.D. Tex. 2010), aff'd, 670 F.3d 664 (5th Cir. 2012).

3 U.S.—City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

4 §§ 985 to 989.

5 U.S.—Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613 (5th Cir. 2007); Contributor v. City of Brentwood, Tenn., 726 F.3d 861 (6th Cir. 2013).

6 U.S.—Contributor v. City of Brentwood, Tenn., 726 F.3d 861 (6th Cir. 2013).

7 U.S.—Houston Chronicle Pub. Co. v. City of League City, Tex., 488 F.3d 613 (5th Cir. 2007).

8 U.S.—M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense, 791 F.2d 1466 (11th Cir. 1986); Shopco Distribution Co., Inc. v. Commanding General of Marine Corps Base, Camp Lejeune, N.C., 696 F. Supp. 1063 (E.D. N.C. 1988), decision aff'd, 885 F.2d 167 (4th Cir. 1989).
Necessary for communication with troops
U.S.—Swarner v. U.S., 937 F.2d 1478 (9th Cir. 1991).

9 Ga.—Statesboro Pub. Co., Inc. v. City of Sylvania, 271 Ga. 92, 516 S.E.2d 296 (1999).

10 U.S.—Ad World, Inc. v. Doylestown Tp., 672 F.2d 1136 (3d Cir. 1982).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

4. Newspapers or Periodicals

c. Distributing or Delivering Newspapers or Periodicals

§ 1010. Newsstands and vending machines

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2080

The First Amendment guaranty of free speech and press protects the right of newspaper publishers to distribute their newspapers via racks, vending machines, and similar means, without unreasonable interference by the government.

The distribution of newspapers and other periodicals by racks and vending machines in public places, such as public streets and highways, is protected[1] and, generally, is not subject to a total ban.[2] This is true even where the regulation is ostensibly predicated on such government interests as the aesthetics of the public place, reducing congestion, maintaining security, or the preservation of independent revenue for the government property owner.[3] A restriction must be content-neutral;[4] reasonable as to time, place, and manner;[5] and narrowly tailored to serve the government's significant legitimate interests.[6] It may, however, include licensing requirements[7] and reasonable fees.[8]

Specific examples of acceptable and unacceptable regulations.

A municipal ordinance for the placement, design, and composition of newspaper racks is valid as narrowly tailored to serve the city's substantial interests in aesthetics and public safety, imposing uniform requirements on the appearance of news racks to advance municipality's significant interest in aesthetics, and requiring steel material and a cement base to further the city's interest in public safety.[9] A city ordinance that prohibits the use of news racks in a designated architectural district is valid as narrowly tailored to promote the city's substantial government interest in the aesthetics of the area, when the city commission that drafted ordinance duly considered alternatives to news rack use in addressing its aesthetic concerns, the ordinance provides for alternative newspaper distribution means by store placement, home delivery and street vendors, and the use of street vendors in the area is not prohibitively expensive.[10]

A city plan cannot validly require a publisher wishing to sell newspapers on news racks in the airport to lease government-owned news racks, all of which carry advertisements for a certain soft drink, since the plan discriminates between speech based on viewpoint and content in violation of the First Amendment.[11]

A summary seizure of news racks without giving the newspaper publisher an opportunity to contest their removal violates the publisher's right to freedom of the press.[12]

Footnotes

1 U.S.—City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988); Lauder, Inc. v. City of Houston, Texas, 751 F. Supp. 2d 920 (S.D. Tex. 2010), aff'd, 670 F.3d 664 (5th Cir. 2012).

News stand regulation implicates First Amendment

U.S.—Weinberg v. City of Chicago, 310 F.3d 1029 (7th Cir. 2002).

Public airport terminal restrictions invalid

U.S.—The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority, 597 F.3d 570 (4th Cir. 2010); Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation, 322 F.3d 1298 (11th Cir. 2003).

2 U.S.—The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority, 597 F.3d 570 (4th Cir. 2010); Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993).

Valid ban in architectural district

U.S.—Hop Publications, Inc. v. City of Boston, 334 F. Supp. 2d 35 (D. Mass. 2004).

3 U.S.—The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority, 597 F.3d 570 (4th Cir. 2010).

4 U.S.—OSU Student Alliance v. Ray, 699 F.3d 1053, 286 Ed. Law Rep. 83 (9th Cir. 2012), cert. denied, 134 S. Ct. 70, 187 L. Ed. 2d 29 (2013).

N.Y.—Uhlfelder v. Weinshall, 47 A.D.3d 169, 845 N.Y.S.2d 41 (1st Dep't 2007).

5 U.S.—Jacobsen v. Illinois Dept. of Transp., 419 F.3d 642 (7th Cir. 2005); Jacobsen v. Department of Transp., 450 F.3d 778 (8th Cir. 2006).

6 U.S.—Jacobsen v. Illinois Dept. of Transp., 419 F.3d 642 (7th Cir. 2005); Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037 (9th Cir. 2002).

N.Y.—Uhlfelder v. Weinshall, 47 A.D.3d 169, 845 N.Y.S.2d 41 (1st Dep't 2007).

7 U.S.—City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

8 U.S.—Jacobsen v. Illinois Dept. of Transp., 419 F.3d 642 (7th Cir. 2005); Jacobsen v. Keith, 509 Fed. Appx. 576 (8th Cir. 2013); Lauder, Inc. v. City of Houston, Texas, 751 F. Supp. 2d 920 (S.D. Tex. 2010), aff'd, 670 F.3d 664 (5th Cir. 2012).

9 U.S.—Lauder, Inc. v. City of Houston, Texas, 751 F. Supp. 2d 920 (S.D. Tex. 2010), aff'd, 670 F.3d 664 (5th Cir. 2012).

10 U.S.—Hop Publications, Inc. v. City of Boston, 334 F. Supp. 2d 35 (D. Mass. 2004).

11 U.S.—Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation, 322 F.3d 1298 (11th Cir. 2003).

12 U.S.—Miller Newspapers, Inc. v. City of Keene, 546 F. Supp. 831 (D.N.H. 1982).

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